84-641

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
BROTHERHOOD OF RAILROAD SIGNALMEN,
BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
and the UNITED TRANSPORTATION UNION,
Petitioners,

v.

UNITED STATES OF AMERICA, and the
INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Date: October 19, 1984

Questions Presented For Review

In the opinion of petitioners Brotherhood of Maintenance of Way Employes, Brotherhood of Railroad Signalmen, Brotherhood of Railway and Airline Clerks, International Association of Machinists and Aerospace Workers, and the United Transportation Union,* the following issues are presented by this case:

1. Did the United States Court of Appeals for the District of Columbia Circuit improperly narrow the protections which Congress has given railroad employees since 1940 by concluding that the mandatory instructions in Section 11344(b)(1)(D) of the Interstate Commerce Act, 49 U.S.C. § 11344(b)(1)(D), that the Interstate Commerce Commission consider "the interest of carrier employees affected by the proposed transaction," required the Commission to consider the interests of only applicant rail carrier employees affected by the proposed transaction when deciding whether that proposed transaction was consistent with the public's interest?

2. Did the United States Court of Appeals for the District of Columbia Circuit err in concluding that Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347, did not require the Interstate Commerce Commission to provide a fair arrangement, or to even consider whether, in its discretion, it should provide such an arrangement to protect the interests of rail carrier employees who were not employees of the applicant carriers, but who were adversely affected by the control and related transactions approved by the Commission in this case?

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* Besides respondents United States of America and the Interstate Commerce Commission which are named in the caption of this case, the following parties are listed as respondents herein pursuant to Rule 19.6 of the Rules of this Court, even though several of these parties are filing separate petitions with the Court: American Train Dispatchers Assoc.; Atchison, Topeka & Santa Fe Railroad; Denver & Rio Grande Western Railroad; Kansas City Southern Railway; Louisiana & Arkansas Railway; Missouri Pacific Corp.; Missouri Pacific Railroad; St. Louis Southwestern Railway; Southern Pacific Transportation Co.; Union Pacific Corp.; Union Pacific Railroad; Western Pacific Railroad; and Edward K. Wheeler.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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No.

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Petitioners Brotherhood of Maintenance of Way Employes, Brotherhood of Railroad Signalmen, Brotherhood of Railway and Airline Clerks, International Association of Machinists and Aerospace Workers, and the United Transportation Union [hereinafter, "Rail Labor petitioners"], pursuant to 28 U.S.C. § 1254(1), respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review and to reverse the decision of that court which was entered on May 22, 1984, affirming a decision and order of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"]

which approved the creation of a consolidated rail system encompassing the Union Pacific, Missouri Pacific and Western Pacific railroads.

Opinions Below

The decision of the United States Court of Appeals for the District of Columbia Circuit which denied Rail Labor's petition to set aside the order of the ICC, is reported below as *Southern Pacific Transportation Co.* v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984); that decision is reproduced as Appendix A in the separately bound Appendix which was filed with this Court on October 17, 1984, in this and in two other cases under the lead caption *Kansas City Southern Ry.* v. *United States*, Sup. Ct. No. 84-621. That decision affirmed in all material respects a decision and order of the ICC which had been served on October 20, 1982, and which is reported as *Union Pacific Corp.—Control—Missouri Pacific Corp.*, 366 I.C.C. 459 (1982); that ICC decision and order is reproduced as Appendix B in the separately bound Appendix.

Jurisdiction

On November 1, 1982, the Rail Labor petitioners filed a petition with the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. §§ 2321(a) and 2341, *et seq.*, requesting that court to review the decision and order of the ICC which had been issued on October 20, 1982; that petition was subsequently transferred to the United States Court of Appeals for the District of Columbia Circuit and consolidated with earlier petitions which had been filed by other parties to review that same ICC decision and order. On May 22, 1984, the court of appeals issued its decision which, among other rulings, rejected Rail Labor's challenges to the ICC's order (Appendix A at 34a), and affirmed that order in material part.[1]

[1] The court of appeals also concluded that the Commission failed to explain adequately its reasons for denying the Denver & Rio Grande Western Railroad's request for independent rate making authority (Appendix A at 32a-33a), and remanded the case to the ICC for further consideration of that issue. *Id.* at 38a. All other challenges raised by the numerous petitioners before that court were rejected.

Although the Rail Labor petitioners did not file a petition for rehearing, several other parties did,[2] but on July 20, 1984, the court of appeals denied those petitions. Rail Labor Petitioners asked this Court through Chief Justice Warren E. Burger to extend the time in which they could file with this Court a petition for a writ of certiorari, and on August 2, 1984, this Court granted petitioners herein an extension of time to and including October 19, 1984, in which to file this petition. *Brotherhood of Maintenance of Way Employes, et al.* v. *ICC*, Sup. Ct. No. A-65. This petition for a writ of certiorari has been filed within that extended time period pursuant to 28 U.S.C. § 1254(1).

Statutes Involved

Besides those statutory provisions set forth in full in Appendix E in the separately bound Appendix, Rail Labor petitioners submit that the following statute is involved in its petition:

Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347, provides as follows:[3]

> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this

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[2] Three petitions for rehearing were filed in this case: Edward K. Wheeler filed one in D.C. Cir. No. 82-2342; the American Train Dispatchers Association filed one in D.C. Cir. No. 82-2479; and the Kansas City Southern Ry. and Louisiana & Arkansas Ry. filed one in D.C. Cir. No. 82-2370.

[3] 49 U.S.C. § 11347 is a recodification without substantive change of former Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f) (repealed). Pub. L. No. 95-473, 92 Stat. 1337 (1978). Since Congress specifically provided in the recodification statute that the changes in wording were not to be "construed as making a substantive change in the law replaced" (§ 3(a), 92 Stat. 1466), petitioners have included as Appendix J to this Petition former Section 5(2)(f) along with Section 11347 to enable a ready comparison of the two provisions.

> subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

Statement of the Case

In September 1980, the Union Pacific Corporation, the Missouri Pacific Corporation, and their related railroad subsidiaries the Union Pacific and Missouri Pacific railroads, filed a series of applications with the Commission seeking approval of the Union Pacific's control of the Missouri Pacific under 49 U.S.C. §§ 11343 and 11344. At that same time, the Union Pacific filed an application for Commission approval of its control of the Western Pacific Railroad. Appendix B at 60a-61a. Those applications generated a plethora of responses including oppositions from many competing railroads and requests from rail labor that the Commission carefully consider, weigh and protect the interests of railroad employees who might be affected by the transactions, if those transactions were to be approved. In October 1982, the ICC issued a massive decision of almost two hundred pages of text in which it concluded that the control applications were consistent with the public interest. That decision and order approved those applications, subject to certain conditions, including provisions intended to protect some, but not all, of the rail carrier employees who might be affected by those transactions. Appendix B at 310a-11a, 327a-30a. On December 22, 1982, the applicants effectuated their control transaction.

When the combined rail system became a reality in December 1982, that system consisted of approximately 22,297 miles of track stretching from all major ports on the West Coast to the major ports in the Gulf area. Appendix B at 63a-64a.

Besides being extensive in size, the combined system and its corporate relations were gargantuan in financial terms, for the combined corporate systems, including their non-rail interests, together grossed $6,177,236,000 in 1979, with net revenues of $567,357,000. Appendix B at 62a-64a. Except for the Burlington Northern Railroad, the new rail system—*i.e.*, the Pacific Rail System, Inc.—clearly dwarfed all other rail systems west of the Mississippi. Appendix B at 595a-613a.

A. *Impact of Pacific Rail System on Railroad Employees*

Rail labor protested against the control and related applications because the petitioners asserted that an approval of those applications would have a harmful effect on their members who were employed either by the control applicants or by the other railroads which would be adversely affected by the strength of the combined system. While the ICC examined the impact which the consolidation would have on Union Pacific, Missouri Pacific and Western Pacific railroad employees (Appendix B at 277a), the Commission did not discuss or even acknowledge the evidence in the record which showed the devastating impact which the consolidation would have on the employees of the carriers which will have to eke out their existence in many of the markets now dominated by the newly created Pacific Rail System.

Rail Labor presented evidence to the Commission which showed that consolidating the previously independent and competing Union Pacific, Missouri Pacific and Western Pacific railroads would adversely affect employees on the Atchison, Topeka & Santa Fe Railway, the Burlington Northern, the Chicago, Milwaukee, St. Paul & Pacific Railroad, the Denver & Rio Grande Western Railroad, the Illinois Central Gulf Railroad, the Kansas City Southern Railway, the Missouri-Kansas-Texas Railroad and the Southern Pacific system [hereinafter, "Sante Fe," "BN," "Milwaukee," "Rio Grande," "ICG," "KCS," "Katy," and "SP," respectively]. That evidence showed, for example, that over 500 railroad jobs on the Milwaukee would be placed in jeopardy by the creation of the Pacific Rail System, and that from 20% to 40% of the KCS trainmen at the Kansas City terminal stood to lose their jobs due to rail traffic being diverted to Pacific Rail System.

Rail Labor's predictions did not stand unsupported, for the affected carriers also presented evidence which showed that their employees would bear a substantial burden as a result of the Pacific Rail System's success. For example, the Rio Grande estimated that approximately 176 of its employees would lose their jobs as a result of the consolidation, even if that carrier were granted all of the relief it was seeking in this case; without such relief, the Rio Grande believed that approximately 350 of its employees would be deprived of their jobs. Both the SP and Santa Fe also predicted that their employees would be impacted severely by the consolidated Pacific Rail System, for the SP's Vice President of Operations stated that as many as 1,000 SP employees could lose their positions as a long-term result of the consolidation, and the Santa Fe predicted that over 200 of its employees would lose their jobs because of traffic diverted to the consolidated system.

Those estimates of substantial employee impact were further substantiated by the evidence in this record, for in its decision, the Commission concluded that the protesting railroads were correct in believing that the Pacific Rail System would divert traffic from their lines which would in turn cause most of them to sustain substantial losses of revenue.[4] While the Santa Fe submitted that it would lose $64 million in gross revenues per year due to traffic diversions, the ICC concluded that a loss of $54.3 million was supported by the evidence. Appendix B at 458a. The Milwaukee believed that it would lose $5.4 million annually (*Id.* at 69a) and the Rio Grande expected to lost $35.3 million in gross revenues per year due to the consolidation. *Id.* at 69a-70a. According to the ICC, both estimates were reasonable. *Id.*, at 461a, 476a-77a. Even though the ICC did not accept in full the estimates by the KCS and SP as to their expected losses (*i.e.*, the KCS predicted a loss of $13.6 annually, and the SP predicted a loss of $105.2 million per year), the ICC concluded that both carriers, considering

[4] The BN predicted it would lose $193.9 million in gross revenues per year by 1985 in lost coal movements, but the ICC opined that this loss would not occur because the BN's predictions were based on the anticompetitive aspects of the consolidation on coal movements and the Commission had concluded that the transaction was not anticompetitive. Appendix B at 458a-59a.

their relative sizes, would sustain substantial traffic diversions; the KCS' annual loss was placed at $5.2 million by the ICC, and the SP's was placed by that agency at $54.5. Appendix B at 471a, 505a.

Those revenue losses clearly jeopardized the jobs of many railroad employees because as Rail Labor pointed out to the ICC, albeit without effect, carriers reduce forces when they suffer a decline in revenues. Moreover, the effect of the elimination of jobs as a result of diversions of traffic away from competing carriers does not end with the employees whose jobs are in fact abolished. The employees' exercise of seniority to bid into positions held by individuals in the same craft or class with lesser seniority, creates an effect which ripples through the entire seniority district of the affected carriers. The net result may well be the furloughing of workers with the lowest seniority, who will be forced into a job market that already faces a severe and significantly high rate of unemployment.

When an employee is furloughed because of traffic diversions, the hardships of unemployment do not depend on whether he was employed by the applicant carrier or by another carrier. The result, the cause, and the consequent need for protections from adverse effects of the transactions at issue are all identical, no matter who was the employing carrier prior to the creation of the Pacific Rail System. In a case such as the one at bar, however, being an employee of the consolidated carriers is helpful to the furloughed employee because the consolidation, according to the applicants, will increase employment opportunities for their employees in the long run. Consequently, a furloughed employee of the Pacific Rail System has a chance of being reemployed; an employee of a non-applicant who is furloughed because of the consolidation, does not enjoy that same prospect of reemployment in the railroad industry.

B. *ICC's Consideration of Railroad Employee Interests*

As the ICC acknowledged in its decision, its consideration of the control applications was governed by 49 U.S.C.

§ 11344(b)[5] which required the Commission to consider various factors in determining whether a proposed consolidation is consistent with the public interest, including the impact of the transaction on the interests of "carrier employees." Appendix B at 78a, 84a. Rail Labor had asked the ICC to consider the interests of all railroad employees which the record showed would be affected by this consolidation, and not just the interests of those employees who were employed by carriers which were applicants in this case. While the ICC conceded in its brief to the court of appeals in this case that the "employees" referred to in 49 U.S.C. § 11344(b)(4) included *all railroad* employees affected by the proposed transactions and not just employees of the applicant carriers (ICC Brief to D.C. Cir. at 19, 76), the ICC did not specifically, or even indirectly, address the interests of non-applicant carrier employees while it was considering whether the control applications were consistent with the public interest.

That failure was not from lack of opportunity, for the ICC's own analysis showed that the consolidated system would divert traffic worth $184.8 million annually in revenue from competing railroads. Appendix B at 591a-92a. However, in analyzing the impact of that diversion upon the public interest, the ICC examined only the effect that this loss of traffic would have upon the competing railroads' ability to provide essential rail services; it did not go that one step further and examine what impact this loss of revenue would have on rail employees. As the ICC explained in defining the scope of its inquiry on this subject:

> Consolidations often cause shifts in market patterns and divert traffic away from non-included carriers. Sometimes carriers losing market share as a result of the consolidation may not be able to withstand the loss of traffic and must downgrade and perhaps eventually abandon their routes. Traffic diversions

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[5] On October 14, 1980, § 228 of Public Law No. 96-448, 94 Stat. 1895, 1931, was enacted which modified 49 U.S.C. § 11344(b); that amendment did not modify § 11344(b)(4). Section 11344 was further amended by § 21 of Pub. L. No. 97-261, 96 Stat. 1123, which redesignated Section 11344(b)(4) as 11344(b)(1)(D); that amendment was not effective until after the ICC's decision was issued in this case.

> could even lead to financial failure of a railroad and liquidation of its system. It is not our duty to ensure preconsolidation levels of traffic for competitors. Our concern is the preservation of essential services, not the survival of particular carriers.

Appendix B at 168a. Its review in this case led it to conclude that "no carrier will incur revenue losses as a result of the proposed transactions to a degree threatening its ability to continue to provide service over its system." *Id.* at 169a. Even though it recognized that several competing carriers would suffer severe revenue losses and that they would have to modify their existing operations to survive (*Id.* at 509a-15a), the ICC did not consider in its decision the impact which those actions would have on railroad employees, and it did not show what role, if any, that impact on employee interests played in its public interest analysis.

When it did address Rail Labor's arguments that Section 11344(b)(4) of the Interstate Commerce Act required it to examine the impact of the transaction on competing railroad employees, the ICC viewed that argument as if petitioners were asserting that Section 11344(b)(4) "require[d] us to impose labor protective conditions to protect all railroad employees, both of applicants and non-applicants alike, which are adversely affected by a consolidation proceeding." Appendix B at 280a. According to the ICC, Section 11344(b)(4)'s requirement that employee interests be considered did not also require that those interests be protected; as the ICC stated,

> The general language in section 11344(b) is designed to focus our consideration of these primary transactions, and is not intended to be used as a vehicle for mitigating incidental impacts. This language, which itemizes the several criteria to be considered in making our public interest determination in a consolidation proceeding, in no way supplements or contradicts the specific Congressional directive concerning labor protective conditions in 49 U.S.C. § 11347. . . .

Appendix B at 280a.

Relying upon 49 U.S.C. § 11347 and alternatively upon the Commission's equitable powers under Section 11344(c) to impose conditions upon its approval of a transaction, Rail Labor had also asked that the ICC condition any approval of the transaction by imposing a fair arrangement to protect the interests of all railroad employees affected by the proposed transactions. In its decision, the ICC rejected petitioners' interpretation of the reach of Section 11347 because it concluded that:

> The meaning of [that section] . . . , as confirmed by pertinent legislative history, is well established. Congress, at the time of enactment of the Transportation Act of 1940, did not consider protection of employees beyond those employed by the carriers that were parties to the transaction itself. This legislation was unchanged until the 4R Act, which expanded the scope of employee protection, but not the class of employees to be protected. . . .

Appendix B at 280a-81a. The ICC never addressed Rail Labor's discretion argument and the Commission did not impose any conditions in its Order to protect the interests of non-applicant railroad employees whom the evidence showed would be affected by the consolidation in this case.[6]

C. *Court of Appeals Consideration of Employee Challenges*

In the proceedings before the court of appeals on Rail Labor's petition to review the ICC's decision and order, petitioners challenged both the ICC's failure to consider the interests of the employees of the competing rail carriers when it concluded that the control applications were consistent with the public interest, and the Commission's failure to impose an

[6] The ICC did impose employee protective provisions as a condition of its approval of certain trackage rights and/or pooling arrangements which were granted to four (4) of the competing carriers; those protective arrangements protect the employees of those competing carriers who are affected by the trackage rights or pooling arrangement, but do not include protections for injuries caused by the diversion of traffic. Appendix B at 281a.

arrangement to protect the interests of those railroad employees. Those arguments were characterized and rejected by the appellate court by the following statement:

> Petitioners' first argument—that 49 U.S.C. §§ 11344(b)(1)(D) and 11347 require the Commission to protect the interests of all affected railroad employees—has been recently considered and rejected by this court. *See Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295, 323-24 (D.C. Cir. 1983). We see no need at this point to add to the thorough discussion of that opinion nor do we find any different result warranted.

Appendix A at 34a.

In *Lamoille Valley,* the appellate court was faced with a challenge by the Lamoille Valley Railroad (a competing, non-applicant carrier) to the ICC's failure to consider or to protect the interests of its employees when that agency approved a control case involving the Maine Central and the Boston & Maine railroads. Appendix I at 1b.[7] Both aspects of the Lamoille Valley's challenge were rejected because the court concluded that the class of carrier employees referred to in both Sections 11344(b)(4) and 11347 referred to employees of the applicants only. *Id.* at 3b. That construction of the Act was, in the court's view, sensible, supported by its legislative history, and consistent with prior interpretations of these sections by the ICC and by other federal courts. *Id.* at 3b-5b.

That view of the Act, although it led the court to the same result reached by the ICC, is inconsistent with the Commission's prior interpretation of Section 11344(b) that Congress has required it to consider the interests of all railroad employees in making its public interest finding. *See,* page 8, *supra.* Moreover, that view of the limited nature of Section 11347 is inconsistent with a line of cases in the 1960's which clarified that Congress required the ICC to impose a fair arrangement to protect all railroad employees affected, and not just employees of the applicants.

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[7] For the convenience of this Court, petitioners have attached to this petition a copy of the relevant portions of the court of appeals' decision in *Lamoille Valley;* these excerpts have been designated as Appendix I since the last appendix in the separately bound Appendix was designated at Appendix H.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Conflicts With Other Decisions By Reviewing Courts on an Issue Which is Important to the Orderly Administration of the Interstate Commerce Act

It has long been recognized that the railroad employee is an essential component of our nation's rail transportation system, and since at least 1933 with the passage of the Emergency Railroad Transportation Act, 48 Stat. 211, Congress has recognized the importance of shielding all railroad workers from bearing unaided the burden of the economies which rail carriers can achieve at the expense of labor. *E.g.*, Emergency Railroad Transportation Act of 1933, § 7, 48 Stat. 218. Before its present change of philosophy, the ICC was well aware of the important role which rail labor played in maintaining an efficient national rail transportation system (*e.g., St. Paul Bridge & Terminal Ry.—Control,* 199 I.C.C. 588, 595 (1934)), and lest it forget, Congress in 1940 mandated that whenever the Commission considered a merger or related application, it must consider "the interest of the carrier employees affected." 49 U.S.C. § 5(2)(c)(4), now 49 U.S.C. 11344(b)(1)(D). Moreover, Congress also commanded in that same legislation that whenever the ICC authorized a transaction under those merger provisions, it must "require a fair and equitable arrangement to protect the interests of the railroad employees affected." 49 U.S.C. § 5(2)(f), now 49 U.S.C. § 11347.

When it enacted what are now Sections 11344(b)(1)(D) and 11347 in 1940, Congress was concerned with preserving an efficient *national* rail transportation system, and it made mandatory the consideration of employee interests which, as this Court had stated in *United States* v. *Lowden,* 308 U.S. 225 (1939), were encompassed within the public interest:

> It is thus apparent that the steps involved in carrying out the Congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress *and its harsh consequences may so seriously affect employee morale as to require*

> *their mitigation both in the interest* of the successful prosecution of the Congressional policy of consolidation *and of the efficient operation of the industry itself,* both of which are of public concern within the meaning of the statute.

308 U.S. at 233 (footnote omitted; emphasis added).

This national interest in the "stability of the labor supply available to the railroads" has been recognized since the passage of the 1940 Transportation Act, and it is the effect of a particular transaction upon all employees who comprise this "national railroad system" (*see, ICC* v. *Railway Labor Executives' Assoc.,* 315 U.S. 373, 377 (1942)) which is the aspect of the public interest factor to which Congress was referring when it enacted what is now 49 U.S.C. § 11344(b)(1)(D). Congress' concern, as is evident from the inclusion provisions of Section 11344(b)(1)(B), was not solely with the applicant carriers, but with all rail carriers, and *a fortiori* with their employees, in the applicants' service area. That concern requires that the interests of all railroad employees affected be considered and weighed in the public interest determination.

Congress' commands which are set forth in Sections 11344(b)(1)(D) and 11347 have been the subject of several review proceedings since 1940. In all but one of those cases, the appeal from which was subsequently dismissed as moot,[8] the reviewing courts either have specificially concluded or have assumed that the term "carrier employees" as used in what is now Section 11344(b)(1)(D) referred to all railroad employees and not just to "carrier employees of the applicants." *Missouri-Kansas-Texas R.R.* v. *United States,* 632 F.2d 392, 412-13 (5th Cir. 1980), *cert. denied,* 451 U.S. 1017 (1981); *Soo Line R.R.* v. *United States,* 280 F. Supp. 907, 923 (D. Minn. 1968) (3 Judge Court); *Railway Labor Executives' Assoc.* v. *United States,* 226 F. Supp. 521, 525 (E.D. Va.) (3 Judge Court), *vacated on other grounds,* 379 U.S. 199 (1964); *Railway Labor Executives' Assoc.* v. *United States,* 216 F. Supp. 101, 102-03 (E.D. Va. 1963) (3 Judge Court). Indeed, the Com-

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[8] *Florida E.C. Ry.* v. *United States,* 259 F. Supp. 993 (M.D. Fla. 1966) (3 Judge Court), *appeal on relevant part dismissed as moot sub nom. Railway Labor Executives' Assoc.* v. *United States,* 386 U.S. 544 (1967).

mission itself has acknowledged in this case, both in its decision (Appendix B at 80a, 84a) and in its brief to the court of appeals (ICC Br. at 19, 76), that the term "carrier employees" in Section 11344(b)(1)(D) refers to all railroad employees who might be affected by the proposed transaction. In light of the breadth of the other specifically enumerated factors in section 11344(b)(1) and the policy statement in Section 10101a(12) that the ICC must "encourage fair wages and safe and suitable working conditions in the railroad industry" when it exercises its powers under the Act, it is difficult to see how the ICC or any court could legitimately take a more narrow view of the term "carrier employees."

Nevertheless, the court of appeals in this case, by adopting its earlier discussion in *Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295 (D.C. Cir. 1983), has narrowed the class of employees which the vast majority of reviewing courts have said are encompassed within the plain terms of Section 11344(b)(1)(D). By thus narrowing the term "carrier employees" to "carrier employees of the applicants," the court of appeals has effectively repealed a significant part of the procedural protections which Congress gave to railroad employees in 1940 and has, in effect, deprived thousands of rail employees of a clear statutory right to demand that the ICC consider their interests and weigh those interests in its public interest determination before it authorizes other railroads to consummate a transaction which could destroy their economic livelihood.

Such a callous disregard of railroad employees is contrary to Congress' intent as expressed in virtually every major piece of legislation affecting our nation's railroads since the Transportation Act of 1920, 41 Stat. 456, that the interests of all railroad employees are an important aspect of the public interest. *E.g., United States* v. *Lowden, supra,* 308 U.S. at 235-38. Congress' concern for the welfare of all railroad employees has not changed in recent years, for Congress has recently recognized that "experienced railroad employees make a valuable contribution toward strengthening the railroad industry" (Section 2(a)(4), Milwaukee Railroad Restructuring Act, 45

U.S.C. § 901(a)(4)), and it has consistently provided for both priority of employment and retraining for rail employees who lose their employment by restructurings and abandonments in the rail industry. *E.g.*, 45 U.S.C. §§ 565(b)(4), (5), 907, and 1004. Moreover, in order to preserve a supply of skilled and dedicated rail employees in such a specialized and declining trade, Congress has consistently required that affected rail employees not be left economically unaided by their employers. *E.g.*, 45 U.S.C. §§ 908, 1005, as amended. In the case at bar, however, the court of appeals has derailed Congress' statutory formula for an efficient national rail system by holding that the ICC does not have a statutory duty to consider the interests of all railroad employees who might be affected by the proposed transaction.

In view of the ICC's conclusion that it should approach the public interest determination by considering whether a "transaction would cause any harm to essential services" (Appendix B at 168a), it is crucial to rail labor and to the rail industry that this Court resolve whether petitioners are correct in asserting that the term "carrier employees" in Section 11344(b)(1)(D) refers to all railroad employees, or whether the District of Columbia Circuit is correct in ruling that Congress intended to limit that term to employees of the applicants. In view of the massive Santa Fe-Southern Pacific merger case which is presently pending before the ICC,[9] it is important that this issue be resolved *before* more employees are needlessly and improperly affected without their interests even being weighed by the ICC in its public interest determination.

II. The Court Of Appeals Has Decided An Issue Important To The Orderly Administration Of The Interstate Commerce Act In Such A Manner As To Misstate Legislative History And To Conflict With Earlier Decisions By Three Judge Courts Authoritatively Construing 49 U.S.C. § 11347

When the court of appeals' decision in this case and in *Lamoille Valley R.R.* v. *ICC, supra,* are analyzed, it becomes apparent that the District of Columbia Circuit reached its

[9] *Santa Fe-Southern Pac. Corp.—Control—Southern Pac. Transp. Co.*, ICC Finance Docket No. 30,400.

erroneous decision to narrow the class of employees encompassed by 49 U.S.C. § 11344(b)(1)(D) in order to maintain the internal logic of its holding that Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347, did not require the ICC to provide a fair arrangement to protect the interests of all affected railroad employees, notwithstanding the clear language in former Section 5(2)(f) of the Act. *See*, note 3, *supra*. That internal logic holds as long as the term "carrier employees" is construed narrowly to exclude all but applicant carrier employees; but if, as shown above, such an exclusion is contrary to Congress' intent and to the clear meaning of the Act, then the court of appeals' clearly erred in ruling that Section 11347 requires the ICC to protect employees of the applicant carriers only.

While the Fifth Circuit has reached the same conclusion with respect to the scope of Section 11347, albeit in a manner that lacks the consistency of the *Lamoille Valley* court's reasoning since the Fifth Circuit implicitly assumed that Section 11344(b)(1)(D)'s procedural protections applied to all carrier employees (*Missouri-Kansas-Texas R.R.* v. *United States*, *supra*, 632 F.2d at 411-13), the decision below is in direct conflict with the decisions of other reviewing courts which had addressed this issue prior to Congress' amendment of Section 5(2)(f) in 1976.[10] *Soo Line R.R.* v. *United States*, *supra*; *Railway Labor Executives' Assoc.* v. *United States* [hereinafter, "*Richmond Terminal*"], *supra*, 216 F. Supp. at 102-03; *accord*, *Railway Labor Executives' Assoc.* v. *United States*, *supra*, 226 F. Supp. at 525. Moreover, since the ICC had accepted the *Soo Line* and *Richmond Terminal* courts' construction of the statute before Congress in 1976 expanded the protections required to be given by Section 11347's predecessor, *see*, *Pennsylvania R.R.—Merger*, 347 I.C.C. 536, 546 (1974), the lower court's narrowing of those protections is also contrary to accepted principles of statutory construction and, indeed, misstates applicable legislative history.

When it considered the scope of former Section 5(2)(f), the *Soo Line* court recognized Congress' concern for an efficient national transportation system, and concluded that this policy

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[10] Section 402(a), Pub. L. No. 94-210, 90 Stat. 31, 62 (1976). That amendment required the ICC to expand the levels of protection which it normally imposed in merger, control and similar transactions.

admits no distinction between the employees of applicants and the employees of other railroads when construing the reach of Section 5(2)(f). *Soo Line R.R.* v. *United States, supra,* 280 F. Supp. at 923-24. Moreover, the clear language of the statute required that result, for as that court stated:

> The initial sentence of § 5(2)(f) admits no ambiguity: "... [T]he Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected." To be protected, the employee need only fulfill two requirements: he must be a railroad employee and he must be affected by the merger.

Soo Line, 280 F. Supp. at 922 (footnote omitted). That same approach had been followed by the *Richmond Terminal* court and by the 1964 *Railway Labor Executives' Association* case, although in that latter case the court upheld the ICC's factual conclusion that the employees were not sufficiently affected by the transaction to meet the second prong of the test for protection under the arrangement required by Section 5(2)(f). 226 F. Supp. at 525; *see, Richmond Terminal, supra,* 216 F. Supp. at 102. Moreover, that same construction of the Act was accepted by the ICC unequivocally in 1974. *Pennsylvania R.R.—Merger, supra,* 347 I.C.C. at 546.

Unfortunately, the court of appeals below, by adopting the *Lamoille Valley* decision, looked not to the language of Section 11347 to divine its meaning, but rather, considered the ICC's present reluctance to apply that section properly as having been sanctioned by Congress when it increased the levels of protection required as a minimum by that section in 1976.[11] In asserting that the 1976 amendment to Section 5(2)(f) evidenced a congressional acceptance of a narrow construction of the scope of that provision, the court of appeals ignored the fact that when Congress amended that section in 1976, the ICC was following the *Soo Line* and *Richmond Terminal* rationale. *E.g., Pennsylvania R.R.—Merger, supra.* Therefore, if the basic principles of statutory construction are to be followed, it was error to presume that Congress implicitly intended to repeal the ICC's proper, albeit belated, acceptance of the *Richmond Terminal* and *Soo Line* construction of the statute where

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[11] *See,* note 10, *supra.*

Congress did not indicate any intention to override the *Pennsylvania Merger* case. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275(1974). Moreover, the court's reliance upon the 1976 amendment is inconsistent with the fact that the effect of the 1976 amendment was congressional disapproval of the Commission's failure to impose meaningful levels of protection for railroad employees. *See, New York Dock Ry.* v. *United States*, 609 F.2d 83, 91-94 (2d Cir. 1979).

When viewed properly, the 1976 amendment actually fortifies Rail Labor petitioners' position, for by requiring an arrangement which, among others, provides protections at least as protective as those established by Section 405 of the Rail Passenger Service Act [hereinafter, "RPSA"], 45 U.S.C. § 565, Congress has in effect mandated that employees of non-applicant carriers be protected. Section 405(a) of the RPSA was amended prior to 1976 to require that employees of the contracting carriers *and* "employees of terminal companies" be protected, and the provisions under 45 U.S.C. § 565 to which Section 5(2)(f) referred expressly extended such protections to those employees. Appendix C-1, Article III.

In its reaching to find some support for its rejection of the *Soo Line* and *Richmond Terminal* cases, the court of appeals asserted that its narrow interpretation of Section 11347 was fortified by the second sentence of that statute which now reads as follows: "Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees." However, that assertion is frivolous, for when the codified language is compared with both the original provision and the history of employee protection in the railroad industry, it becomes apparent that Congress never intended to limit the protections afforded by Section 11347 to applicant carrier employees only.

Before it was recodified, the language relied upon by both the ICC and the court of appeals read as follows:

> Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees *may hereafter be entered into by any carrier or carriers by railroad* and the duly authorized representative or representatives of its or their employees.

49 U.S.C. § 5(2)(f), Appendix J hereto (emphasis added).[12] When that language is viewed together with the fact that national collective bargaining was an accepted feature of the railroad industry in 1940 (*e.g.*, Washington Job Protection Agreement of 1936), national bargaining for job security agreements was obviously envisioned by Congress when it drafted Section 5(2)(f). Indeed, agreements by non-merging carriers which in effect provide protections for their employees from effects caused by a merger by others, have occurred before. *E.g.*, Agreement of February 7, 1965, National Mediation Board File No. A-7128.

A fundamental error of the court of appeals' reliance on the recodified language of Section 11347 to interpret the scope of that provision, is that when Congress codified that provision in 1978, it did so with the express understanding that the codification restates "without substantive change" the prior acts, and that the recodification "may not be construed as making a substantive change in the laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. 1466. Congress explained in its report to accompany the recodification statute (H. Rpt. No. 95-1395, 95th Cong., 2d Sess. at 9 (1978)) that:

> Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged.

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[12] The breadth of Section 5(2)(f) is further evidenced by the second sentence of that provision which read in pertinent part that: "In its order of approval the Commission shall include terms and conditions providing that . . . such transaction will not result in *employees of the carrier or carriers by railroad affected by such order* being in a worse position with respect to their employment . . . ." Appendix J (emphasis added).

By looking to the language of the recodified statute to find the proper construction of a 1940 statute, the court of appeals below and the *Lamoille Valley* court ignored the limited nature of that recodification. *E.g., Atchison, Topeka & Santa Fe Ry.* v. *United States,* 617 F.2d 485, 490 (7th Cir. 1980).

As shown by the first reason for granting this writ, the issues presented by this petition are important to all rail employees today. Because virtually the entire rail system in the Western part of our country will be affected by the merger case now pending before the ICC, rail labor and, indeed, the entire rail industry must know whether the *Soo Line* and *Richmond Terminal* cases or the case at bar express the proper construction of the scope of Section 11347 of the Interstate Commerce Act.

Conclusion

For the reasons set forth herein, the Rail Labor petitioners respectfully request that a writ of certiorari be issued to the United States Court of Appeals for the District of Columbia Circuit to review and to reverse the judgment of that Court.

Respectfully submitted,

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Date: October 19, 1984

Appendix I

Excerpts from *Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295 (D.C. Cir. 1983)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1498

LAMOILLE VALLEY RAILROAD COMPANY, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

Argued February 25, 1983
Decided June 28, 1983

Before: WILKEY and WALD, *Circuit Judges,* and BONSAL,* *Senior District Judge* for the Southern District of New York.

Opinion for the Court filed by *Circuit Judge* WALD.

[711 F.2d at 300]

WALD, *Circuit Judge:* We review here a decision of the Interstate Commerce Commission (ICC or Commission) approving unconditionally the merger of the Maine Central Railroad with the Boston & Maine Railroad. *Guilford Transportation Industries—Control—Boston & Maine Corp.,* 366 I.C.C. 292 (1982) [hereinafter cited as *Boston & Maine Merger*].[1] Petitioners, competitors of the Boston & Maine,

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

[1] The ICC shortly thereafter approved unconditionally the merger of the combined Boston & Maine/Maine Central with the Delaware & Hudson Railroad. Guilford Transp. Indus.—Control—Delaware & Hudson Ry., 366 I.C.C. 396 (1982) [hereinafter cited as *Delaware & Hudson Merger*]. We review the ICC's decision concerning the Delaware & Hudson in a companion case to this one, also issued today. Central Vt. Ry. v. ICC, No. 82-2136, ____F.2d____ (D.C. Cir. June 28, 1983).

asked the ICC to protect them from competitive harm due to the merger by imposing various conditions on the merged entity (including sale of track, trackage rights, and preservation of swift traffic interchanges). The ICC declined to impose any protective conditions, finding that none of the petitioners had shown that the conditions it requested were needed to prevent the loss of "essential services."

Petitioners appeal to this court, claiming that the ICC's "essential services" test for imposing protective conditions is too strict and does not comply with the statutory directive that the ICC consider the effect of the merger on "adequacy of transportation to the public." 49 U.S.C. § 11,344(b)(1). Petitioners also argue that some of the ICC's findings are not supported by substantial evidence and that the ICC committed a variety of procedural errors. We reject the procedural challenges as either without merit or not constituting prejudicial error. We conclude, however, that the ICC's essential services test, as applied to petitioner Lamoille Valley Railroad, does not comport with the statute. We also find flaws in the agency's reasoning with regard to protective conditions requested by petitioner Canadian National Railroad. We therefore affirm in part, reverse in part, and remand to the ICC to determine whether protective conditions are needed to protect the public's right to adequate transportation.

* * * *

[711 F.2d at 323-24]

LABOR PROTECTIVE CONDITIONS

In reviewing a railroad merger, the ICC must consider, as part of its public interest determination, "the interest of carrier employees affected by the proposed transaction." 49 U.S.C. § 11,344(b)(1)(D). Moreover, *id.* § 11,347 requires the ICC to protect displaced employees:

> When a rail carrier is involved in a transaction for which approval is sought under [§ 11,344], the Interstate Commerce Commission shall require the carrier to provide a fair arrangement . . . [for] employees who are affected by

> the transaction .... Notwithstanding this [Act], the arrangement may be made by the rail carrier and the authorized representative of its employees.

The Commission provided suitable arrangements for Maine Central and Boston & Maine employees. It did not consider the interests of, nor provide protection for, employees of competing railroads who may lose their jobs as a result of traffic diversions. *See Boston & Maine Merger,* 366 I.C.C. at 344. Lamoille Valley asserts that this was error. We affirm the Commission's interpretation of §§ 11,344(b)(4) and 11,347 as requiring it to protect only employees of the merging railroads and not employees of other railroads.

First, the ICC's interpretation of the language of § 11,347 is sensible. The second sentence of § 11,347 provides that "the arrangement may be made by *the rail carrier* and the authorized representative of *its* employees." (Emphasis added.) The phrase "the rail carrier" presumably refers back to the preceding sentence and thus includes only "a rail carrier ... involved in the transaction." But an arrangement between "a rail carrier involved in the transaction" and "its employees" will not protect employees of other carriers. Thus, Congress must not have contemplated protecting employees of non-applicant railroads. As for § 11,344(b)(4), it was first enacted at the same time as § 11,347, and the two sections should be construed *in pari materia.*

The legislative history of § 11,347 strongly supports this interpretation. *See Missouri-Kansas-Texas Railroad* v. *United States,* 632 F.2d 392, 411-12 (5th Cir. 1980) (reviewing the legislative history), *aff'g Burlington Northern—Control—St. Louis-S.F., supra* note 37, 360 I.C.C. at 948-50, *cert. denied,* 451 U.S. 1017 (1981).[59]

Second, while there may be policy reasons for treating all railroad employees alike regardless of their employer, the Commission's interpretation is supported by considerations of practicality and administrative economy. As the Commission explained in *Burlington Northern,* 360 I.C.C. at 949-50:

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[59] *See generally* New York Dock Ry. v. United States, 609 F.2d 83, 86-90 (2d Cir. 1979) (reviewing at length the development of § 11,347 and predecessor provisions).

> It is difficult enough to determine which employees of a railroad involved in the transaction have been adversely affected by that transaction. To require a determination that employees of another competing carrier have also been affected by a merger . . . would place an impossible burden on the party required to rebut the allegation.

Third, the Commission has consistently interpreted § 11,347, since its original enactment in 1940, to exclude employees of non-applicant railroads.[60] That consistent interpretation is entitled to deference, especially since Congress implicitly approved that interpretation in revising and reenacting § 11,347 in 1976.[61] *See NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) (additional deference to an agency's statutory interpretation is due "where Congress has reenacted the statute without pertinent change") (footnote omitted).

Finally, other courts that have addressed this issue have consistently approved the Commission's interpretation, including the only court to consider the issue since the 1976 amendments to the Interstate Commerce Act. *See Missouri-Kansas-Texas Railroad* v. *United States,* 632 F.2d 391, 411-12

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[60] *See Missouri-Kansas-Texas Railroad* v. *United States,* 632 F.2d at 411 n.44 (citing ICC cases); *see also CSX—Control—Chessie System, supra* note 21, 363 I.C.C. at 590-91.

Pennsylvania R.R.—Merger—New York Cent. R.R., 347 I.C.C. 536, 546 (1974), cited by Lamoille Valley, is not to the contrary, despite the ICC's use of certain broad language. The Commission there construed the predecessor to § 11,347 to cover employees of wholly-owned *subsidiaries* of the merging railroads. It had no occasion to address the status of employees of independent railroads.

[61] The 4R Act, *supra* note, 5, § 402(a), 90 Stat. at 62, added the requirement that labor protective conditions be "no less protective of the interests of employees than those heretofore imposed pursuant to this [section]." Section 402(a) was a last-minute addition to the statute, and there is no legislative history dealing with it. *See* New York Dock Ry. v. United States, 609 F.2d 83, 93 (2d Cir. 1979). This provision was rephrased to its present form without substantive change in the 1978 recodification of the Interstate Commerce Act. *See* 49 U.S.C. note preceding § 10,101 (no substantive change intended); *id.* § 11,347 revision note (explaining wording changes).

(5th Cir. 1980) (a thorough opinion on which our own analysis relies heavily), *cert. denied,* 451 U.S. 1017 (1981); *Florida East Coast Railway* v. *United States,* 259 F. Supp. 993, 1019 (M.D. Fla. 1966) (3-judge court), *aff'd mem. in part and appeal dismissed in relevant part as moot,* 386 U.S. 544 (1967); *Railway Labor Executives' Association* v. *United States (RLEA 2d),* 226 F. Supp. 521, 524-25 (E.D. Va.) (3-judge court), *vacated and remanded per curiam,* 379 U.S. 199 (1964).[62]

* * * *

[711 F.2d at 331]

VII. Conclusion

The ICC's approval of the Maine Central/Boston & Maine merger as a whole is *affirmed.* We *reverse* the Commission's decision denying the protective conditions sought by Lamoille Valley and Canadian National, and *remand* to the Commission to reconsider whether protective conditions (not necessarily the ones sought by Lamoille Valley and Canadian National) are needed to preserve competition or adequate transportation. On all remaining issues, the Commission's decision is *affirmed.*

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[62] *But see* Soo Line R.R. v. United States, 280 F. Supp. 907, 921-24 (D. Minn. 1968) (3-judge court); United Transp. Union, Local Lodge No. 693-E v. Burlington N., Inc., 319 F. Supp. 451, 453-54 (D. Minn. 1970) (following *Soo Line*).

Railway Labor Executives' Ass'n v. United States (*RLEA 1st*), 216 F. Supp. 101 (E.D. Va. 1963) (3-judge court), cited by Lamoille Valley, is distinguishable. It involved a joint facility run by a merging railroad and a non-merging railroad. The court held that employees working at the facility, who were nominally employees of the non-merging railroad but in fact worked for both railroads, were entitled to protection. *See id.* at 103. A year later, the same court, including two of the three judges that decided *RLEA 1st,* upheld the ICC's refusal generally to protect employees of non-merging railroads in *RLEA 2d.*

Appendix J

Side By Side Comparison
Of Section 5(2)(f) And As Recodified

APPENDIX J

Side By Side Comparison Of Section 5(2)(f) And As Recodified

Section 11347

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

Section 5(2)(f)

(f) As a condition of its approval, under this paragraph (2) or paragraph (3), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

(3) (2) (2)

Nos. 84-621, 84-633, 84-641

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
EDWARD K. WHEELER, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
THE INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY, MISSOURI PACIFIC CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY AND THE WESTERN PACIFIC RAILROAD COMPANY IN OPPOSITION TO PETITIONS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Respondents Union Pacific Corporation, Union Pacific Railroad Company (collectively, "Union Pacific"), Missouri Pacific Corporation, Missouri Pacific Railroad Company (collectively, "Missouri Pacific") and The Western Pacific Railroad Company, intervenors in the court below and referred to herein as "respondents," submit this brief in opposition to the petitions for certiorari filed by Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company (collectively, "KCS"), the Brotherhood of Maintenance of Way Employes

and various other rail labor unions (collectively, "the labor parties"), and Edward K. Wheeler.[1]

STATEMENT OF THE CASE

On December 22, 1982, after Chief Justice Burger had denied several applications for stay,[2] Union Pacific acquired control of Missouri Pacific and Western Pacific, and thereby created a single, consolidated railroad.[3] Since then, the facilities, operations and managements of the three companies have been integrated, and the consolidated system has been offering "single-system service" to shippers in the western United States.

These transactions were authorized by an order and decision of the Interstate Commerce Commission, served October 20, 1982, which petitioners challenged unsuccessfully below.[4] App. 39a *et seq.*; see generally 49 U.S.C. § 11343 (Supp. IV 1980), App. 639a. After extensive administrative proceedings, in which the Antitrust Division of the Department of Justice, the Department of Transportation and numerous state governments participated, the ICC determined in a 360-page decision that the consolidations, as conditioned, would be in the public

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[1] Respondents' parents, subsidiaries and affiliates are identified in the Appendix to this brief.

[2] Atchison, Topeka and Santa Fe Railway Co., *et al.* v. Interstate Commerce Commission, Nos. A-544, A-545 and A-546 (Dec. 22, 1982) (Burger, C.J.). That decision was subsequently embraced by the entire Court. See 51 U.S.L.W. 3507 (U.S. Jan. 11, 1983).

[3] Union Pacific obtained 77 percent of Western Pacific's stock in a tender offer of $20 per share that expired in March 1980; those shares remained in an independent voting trust until December 22, 1982. (Union Pacific had previously acquired 9.9 percent of Western Pacific's stock in open market purchases.) In May 1983, Union Pacific acquired the balance of the outstanding Western Pacific stock for $20 per share through a merger approved by the ICC. Union Pacific acquired Missouri Pacific through a stock exchange approved by the companies' shareholders in April 1980.

[4] The ICC's principal opinion was joined by five of the ICC's six Commissioners. Chairman Taylor and Commissioner Simmons also filed concurrences indicating their approval notwithstanding their preference for conditions sought by the Missouri-Kansas-Texas ("MKT") and Burlington Northern railroads that did not receive majority support. Neither of those railroads submitted briefs below in opposition to the ICC's order.

interest, and it found substantial public benefits arising from better service, more efficient operations, enhanced competition, improved job security for employees, and higher levels of employment. *E.g.*, App. 84a *et seq.* The ICC also determined that the terms of the transactions were fair to respondents' shareholders. *E.g.*, App. 298a *et seq.*[5] The ICC subsequently denied several requests for rehearing, and it actively opposed all efforts to stay the effectiveness of its order.[6]

The various petitions for review of the ICC's order were consolidated for decision in the D.C. Circuit Court. The transactions were consummated several weeks later, after that court (Circuit Judges Mikva and Scalia) and Chief Justice Burger had denied petitioners' requests for stay. Thereafter, in a *per curiam* opinion, Circuit Judges Wright, Mikva and Bork affirmed the Commission's decision in all relevant respects.[7]

Summary Of Petitions

Petitioners raise here several discrete issues, none of which was a significant factor in the proceedings before the ICC or the

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[5] The Commission imposed several conditions to maintain the level of competition in the new system's market areas (trackage rights for the Southern Pacific, Denver & Rio Grande Western ("DRGW") and MKT railroads), and it approved respondents' settlements with Conrail and the Chicago & North Western Transportation Company.

[6] The ICC's approval of the consolidations was consistent with recent federal initiatives encouraging end-to-end rail consolidations. For example, the Railroad Revitalization and Regulatory Reform Act of 1976 endorsed "efforts to restructure [the national railway] system on a more economically justified basis." Pub. L. No. 94-210, § 101(a)(2), 90 Stat. 31, 33 (1976). This legislation was followed by the ICC's development of general policy statements reflecting the congressional policy, and by the ICC's subsequent approval of several rail consolidations similar in nature and scope to those approved here. See Railroad Consolidation Procedures, 359 I.C.C. 195 (1978); Railroad Consolidation Procedures, General Policy Statement, 363 I.C.C. 784 (1981).

[7] The Court remanded to the ICC for further consideration of one discrete issue. See App. 32a-33a. That issue concerned the Commission's denial of DRGW's request for a condition affording it "independent rate-making authority" over the Western Pacific portion of the consolidated system. After additional briefing, that issue is now awaiting decision by the ICC.

affirmance below of the Commission's decision. While ten railroad protestants challenged the transactions at various stages below, only KCS has sought review of the Court of Appeals' decision. A highly successful railroad not threatened by the consolidations (App. 243a), KCS has acknowledged that its objective in the proceedings was "personal aggrandizement at the expense of the merging parties."[8] It asked the Commission to expand its system by imposing as conditions to the consolidations trackage rights over nearly 1,000 miles of Missouri Pacific lines; KCS admitted that such rights were totally unrelated to the competitive impact of the consolidations. See App. 28a. The ICC's denial of that request is the principal focus of KCS' petition.

The labor parties' interest here is no more compelling. The ICC found that the approved transactions "will directly benefit labor both by producing a substantial net increase in existing and future employment opportunities and by increasing the job security of their present employees" (App. 277a); nonetheless, the Commission imposed very generous labor protective conditions that obviate any adverse impact of the approved transactions on respondent employees.[9] App. 281a. The D.C. Circuit Court affirmed the Commission's refusal to expand the scope of that labor protection in a decision that recognized the 44 years of consistent ICC decisions on this issue. The Second, Fifth and Seventh Circuit Courts have reached the same result in the last five years.

While several dissenting shareholders challenged the transactions before the ICC, only petitioner Wheeler, a dissenting Western Pacific shareholder, continues to challenge the ICC's

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[8] Transcript of ICC Oral Argument, at 180-81.

[9] These conditions afford adversely affected employees generous displacement allowances, dismissal allowances and fringe benefits for an extended period after implementation of the transactions. See generally, New York Dock Ry.—Control—Brooklyn Eastern District, 366 I.C.C. 60 (1979); Norfolk and Western Ry. Co.—Trackage Rights—BN, 354 I.C.C. 605 (1978), as modified by Mendocino Coast Ry., Inc.—Lease and Operate, 360 I.C.C. 653, 664 (1980).

finding that $20 per share was a fair price for Western Pacific. Wheeler makes this challenge notwithstanding (1) that the D.C. Circuit Court, after a thorough and detailed analysis, squarely rejected each of his arguments; (2) that the $20 price represented a substantial premium over the market price of Western Pacific stock at the time of the acquisition agreement; (3) that the ICC had valued Western Pacific at 50 percent of the offering price only one year before the acquisition agreement; and (4) that appraisal proceedings addressing the value of Western Pacific's stock have been initiated in Delaware state court by dissenting Western Pacific shareholders.

SUMMARY OF ARGUMENT

The decision below is fully consistent with every relevant Supreme Court and Court of Appeals decision addressing the issues presented, none of which involves an unsettled question of federal law. Accordingly, the petitions fail to satisfy this Court's traditional criteria for review.

While KCS contends that the Interstate Commerce Commission should "act as a roving ombudsman restructuring railroads on its own" whenever a consolidation application is submitted for review (see p. 7, below), its position has absolutely no legal support. The D.C. Circuit Court correctly determined that the ICC's rejection of KCS' request for a market extension unrelated to the approved transaction was well within the scope of its discretion.

The ICC's Order approving the transactions was endorsed by a majority of the ICC's six Commissioners. The concurring votes of two Commissioners—both of whom expressly approved the ICC's Order in their separate concurring opinions—cannot be read as constructive "dissents," as KCS contends.

The D.C. Circuit Court properly declined KCS' invitation to substitute its judgment for the judgment of the Commission on a variety of highly technical, quantitative issues. The court below expressly and properly applied the standard of review prescribed by the Administrative Procedure Act and this

Court's precedents. Its affirmance of the Commission's calculation of the public benefits generated by the consolidations does not warrant further review.

Pursuant to its statutory obligations, the ICC imposed for the benefit of adversely affected applicant employees very generous labor protective conditions. The ICC was not obligated to impose protective conditions for the benefit of other railroads' employees adversely affected by the approved transactions. The Second, Fifth, Seventh and D.C. Circuit Courts have all recently held that the conditions imposed by the ICC fully satisfy the governing statute. There is no basis for this Court to review that consistent line of Circuit Court precedent.

The factual issue presented by Wheeler—whether $20 per share was a reasonable price for Western Pacific—does not warrant further review in light of the Court of Appeals' holdings (1) that the ICC's "methodology of valuation is reasonable," (2) that the ICC's "conclusions are supported by substantial evidence in the record," and (3) that the transaction was the result of "arm's length negotiations." App. 36a-37a.

REASONS FOR DENYING THE WRIT

None of the issues presented satisfies this Court's traditional criteria for certiorari. The D.C. Circuit Court's decision is fully consistent with every relevant Supreme Court and Court of Appeals decision addressing the issues presented. Moreover, on almost every issue, the ICC decision affirmed by the Court of Appeals followed consistent and longstanding administrative constructions of the relevant statutes; none of the issues presented involves unsettled questions of federal law. Under these circumstances, the petitions present no basis for this Court's review.

KCS

1. The issues presented by KCS are simple and straightforward. First, with scarcely a mention of the D.C. Circuit's analysis (App. 27a-29a), KCS complains that the ICC erred in

refusing to grant its request for a market extension that KCS admitted has no relationship to the competitive impact of the consolidations. Pet. 9-16. See App. 243a; p. 4, above. The issue presented by KCS is thus one of transportation policy: whether, in the context of rail merger proceedings, the Commission should "act as a roving ombudsman restructuring railroads on its own." App. 29a. While KCS argues that "rove [the ICC] must" (Pet. 15), its position has no support in judicial or administrative precedent or in the relevant statutes. And there certainly is no reason for this Court to address that policy issue, which Congress and the ICC have already resolved in a manner contrary to KCS' position.

The ICC's requirement that conditions be "related to the impact of the consolidation" was developed in rulemaking proceedings addressing public interest standards for conditioning proposed consolidations. *Railroad Consolidation Procedures, General Policy Statement,* 363 I.C.C. 784, 792 (1981). For that reason, the ICC could have "barr[ed] at the threshold" KCS' request.[10] *Federal Power Commission* v. *Texaco,* 377 U.S. 33, 39 (1964); *accord, United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 205 (1956). Nonetheless, the Commission evaluated the merits of KCS' proposed change in its policy and, in a thorough and well reasoned analysis, determined that such a change was not consistent with the public interest, a view shared by the Departments of Justice and Transportation. See App. 194a-197a.

In response to the unanimous conclusions of the D.C. Circuit Court, the ICC, and the Departments of Justice and Transportation, KCS argues only that denial of its requested market extensions frustrates the "procompetitive policy" of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). Pet. 9. But by its very terms, the Staggers Act does not apply to applications—including those in this proceeding—that were pending before the ICC prior to October 1, 1980: such

[10] This is particularly true here, for KCS opted not to participate in the Commission's rule-making proceeding (*Railroad Consolidation Procedures, supra,* 363 I.C.C. at 784-85), even though it had an opportunity to do so after respondents' consolidation applications were filed.

applications "shall be adjudicated or determined as if this Act had not been enacted." *Id.*, § 228(e), 94 Stat. at 1934.[11] Because KCS' entire position rests on its strained reading of a statute that the ICC was not required to apply, there simply is no relevant issue presented here for review.

In any event, the substance of KCS' argument badly distorts the Staggers Act. According to KCS, "this *new* policy imposes a *new* burden on the Commission in protecting the public interest in merger proceedings." Pet. 11 (emphasis added). But the legislative history of the Act confirms that it "would make *no changes* in the present law with respect to major rail mergers: the ICC would consider such proposals under existing standards." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 120 (1980) (emphasis added), *reprinted in* 1980 U.S. Code Cong. & Ad. News, 96th Cong. 4152. If anything, the Staggers Act's emphasis on deregulation refutes the notion that Congress intended government action to displace private initiative as the vehicle for restructuring the nation's rail system. As the D.C. Circuit Court correctly held, KCS' requests for market extensions were properly denied by the ICC. Further review of that underlying policy judgment is not warranted.

2. KCS next contends that the ICC order approving the transactions was "not approved by a majority of Commissioners." With an Alice-in-Wonderland perspective, KCS ignores the fact that five of the six ICC Commissioners enthusiastically endorsed the Decision and Order. Accordingly, this issue, which has virtually no legal substance, does not warrant further review.[12]

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[11] Even though it was not required to do so, the ICC in fact followed the Staggers Act policies in evaluating the consolidations. The ICC's opinion confirmed that "[w]hile the Staggers Act itself is not applicable to this proceeding, the policies set forth in 49 U.S.C. § 11344(b)(5) (1980) as a codification of prior law will be followed." App. 78a. Thus, the court below noted that the ICC merely "elected to adhere to . . . [the Staggers Act's] policies." App. 14a.

[12] As a preliminary matter, it bears emphasis that KCS failed to present this issue to the ICC for its consideration, thus violating its obligation to

(footnote continues)

Without reservation, three of the ICC's six Commissioners (Vice Chairman Gilliam and Commissioners Sterrett and Gradison) joined the Commission's opinion approving the transactions, subject to conditions accepted by respondents. Chairman Taylor and Commissioner Simmons each filed a concurring opinion indicating that notwithstanding his preference for additional conditions, the consolidations as conditioned by the ICC's Order are consistent with the public interest and should be approved. See p. 2 n.4, above. Thus, five of the ICC's six Commissioners endorsed the approval order.

KCS' efforts to convert these two Commissioners' affirmative votes into constructive "dissents" is refuted by the language of their opinions. Thus, addressing the principal ICC decision, Chairman Taylor concluded:

> "I endorse completely our decision to approve the primary and related applications with appropriate conditions, thereby allowing this consolidation to go forward."

App. 315a.[13] *Accord*, App. 321a-322a (concurrence of Commissioner Simmons). That should put an end to this issue.[14]

(footnote continued)

exhaust administrative remedies. *E.g.*, Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 155 & n.15 (1946); see 49 C.F.R. § 1100.98(f) (1981). This omission is particularly egregious here because the issue presented by KCS—whether the Commission incorrectly "tallied" the votes of two of its six Commissioners—was uniquely capable of being clarified by the ICC.

[13] Chairman Taylor reiterated those views in the ICC's order, served November 18, 1982, denying various motions for stay: "[T]he Commission's conclusions and findings are correct in all material matters of fact and law." Neither he nor Commissioner Simmons dissented from that order or from the ICC's subsequent order, served November 24, 1982, again refusing to delay the approved consolidations. These votes demonstrate that there is no basis for KCS' claim that the affirmative votes of Commissioners Taylor and Simmons should be construed as dissents. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 862 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[14] KCS' position that the Commissioners should be bound by their initial preferences for other conditions is frivolous. Union Pacific Railroad Company v. United States, 637 F.2d 764, 767 (10th Cir. 1981); *accord*, Persian Gulf Outward Freight Conference v. FMC, 361 F.2d 80, 84 (D.C. Cir. 1966).

(footnote continues)

3. As its last argument, KCS continues to press its claim that the ICC erred in calculating the precise amount of public benefits generated by the approved transactions. Pet. 19-24. While KCS couches its petition in terms of the standard of review, it seeks here merely to relitigate a variety of highly technical, quantitative issues that were tangential to the result reached by the Commission. The court below properly declined KCS' invitation to substitute its judgment on these complex issues for that of the Commission. It recognized that its obligation under the Administrative Procedure Act was not

> "to re-weigh the evidence or to draw our own inferences from the evidence before the Commission. . . . We can ask only whether the Commission has observed the statutory limits that Congress has set for its discretion, whether its action was arbitrary or capricious, or whether its findings are supported by adequate analysis and substantial evidence in the record considered as a whole." [15]

There can be no serious question that this standard was appropriate and fully consistent with this Court's precedents. *E.g., Bowman Transportation, Inc.* v. *Arkansas Best Freight System*, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971).[16]

(footnote continued)

There is also no support for KCS' position (Pet. 19) that the concurring opinions should be disregarded because they were not introduced at a formal, "collective" voting conference of the ICC. See, *e.g.*, T.S.C. Motor Freight Lines, Inc. v. United States, 186 F. Supp. 777, 785-86 (S.D. Tex. 1960), *aff'd sub nom.* Herring Transp. Co. v. United States, 366 U.S. 419 (1961) (addressing notation voting system).

[15] App. 12a, *quoting* Missouri-Kansas-Texas Railroad Co. v. United States, 632 F.2d 392, 399-400 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981).

[16] KCS fails even to acknowledge the D.C. Circuit Court's explicit discussion (App. 12a) of the standard of review. Moreover, KCS' suggestion that the D.C. Circuit applied a different standard—a so-called "independent judgment test"—is disingenous. KCS Pet. 20. The D.C. Circuit did indeed find that the ICC had exercised "independent judgment" in evaluating the administrative record. App. 24a. But that finding was directly responsive to KCS' arguments below that the ICC had not exercised independent judgment in calculating the public benefits. See, *e.g.*, KCS Br. at 51 ("The ICC's findings [are] based solely on the costing approach taken by the UP parties").

The Labor Parties

Pursuant to its statutory obligation, the ICC considered "the interest of carrier employees affected by the proposed transaction," and imposed for the benefit of displaced applicant employees substantial protective conditions. App. 276a *et seq.*; 49 U.S.C. § 11344(b)(4) (Supp. IV 1980), App. 642a; see 49 U.S.C. § 11347 (Supp. IV 1980). See also p. 4 n. 9, above. The federal courts of appeals consistently have held that these conditions, known as the *New York Dock* conditions, fully satisfy the pertinent statutes. *E.g., Brotherhood of Maintenance of Way Employees* v. *ICC*, 698 F.2d 315 (7th Cir. 1983).

The labor unions challenged below the ICC's refusal (App. 200a) to extend the *New York Dock* conditions to employees of non-applicant carriers allegedly affected by the consolidations; the Court of Appeals sustained that decision. App. 34a; *accord, Lamoille Valley Railroad Co.* v. *ICC*, 711 F.2d 295, 323-24 (D.C. Cir. 1983).[17] This is by no means a novel issue. The unions have "urged [this] broader interpretation upon the Commission and reviewing courts since 1946 . . . ." *Missouri-Kansas-Texas Railroad Co.* v. *United States*, 632 F.2d 392, 411 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981). In the last five years alone, the Second, Fifth and Seventh Circuit Courts, as well as the D.C. Circuit Court, have firmly and unambiguously refused to expand the scope of the *New York Dock* protections. *Id.* at 411-13 ("We affirm the Commission's view that § 11347 requires protection only for employees of the merging carriers"); see *Brotherhood of Maintenance of Way Employees* v. *ICC*, *supra*, 698 F.2d at 318 (the arguments "do not become more convincing by reiteration"); *New York Dock Railway Co.* v. *United States*, 609 F.2d 83, 91-101 (2d Cir. 1979). There is no reason for this Court to review this consistent and longstanding rule of law.

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[17] In *Lamoille Valley*, the D.C. Circuit Court recognized that the Commission had "consistently interpreted § 11347, since its original enactment in 1940, to exclude employees of non-applicant railroads." 711 F.2d at 323-24. In addition to recognizing the deference due this long-standing administrative interpretation, the court held that the ICC's consistent view of the statute reflected a "sensible" interpretation of its language that was "strongly support[ed]" by the legislative history, as well as "by considerations of practicality and administrative economy." *Id.*

Wheeler

The issue presented by petitioner Wheeler is essentially a factual question: whether $20 per share was a reasonable price for Western Pacific. After careful review and analysis, the ICC determined that the $20 per share "price to be paid for WPRR stock under the merger agreement is fair and reasonable." App. 298a-306a. The Court of Appeals concluded that "the Commission's methodology of valuation is reasonable and that its conclusions are supported by substantial evidence in the record." App. 36a.[18] There is no conceivable basis for this Court to review that finding.

The underlying issue presented by Wheeler is now pending before the Chancery Court in Delaware, where dissenting Western Pacific shareholders have sought appraisal rights afforded by Delaware law.[19] Union Pacific agreed at the time of the transaction not to object to dissenting shareholders' pursuing whatever appraisal remedies they might have under state law. See *Schwabacher* v. *United States*, 334 U.S. 182, 201 (1948). Therefore, even if the ICC, the Court of Appeals, Western Pacific's management and Salomon Brothers all erred in concluding that the price was fair, dissenting shareholders who pursue their remedies in Delaware presumably would not be "deprive[d] . . . of just and reasonable compensation for [their] property," as Wheeler alleges. Pet. 6.[20]

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[18] The "substantial evidence" to which the Court referred included the opinion of Salomon Brothers, Western Pacific's financial advisers, that the price was fair (App. 298a-299a), and the fact that the $20 per share offer represented a 38 percent premium over the market price for Western Pacific stock on the day before public announcement of the transaction (App. 305a). In addition, the ICC had valued the shares of Western Pacific at $10 per share only a year before the agreement. See Newrail Co.-Purchase-Western Pacific R.R., 354 I.C.C. 885, 890, 893, 899-901 (1979). Wheeler was Western Pacific's counsel in *Newrail*, where he urged the ICC to endorse the $10 per share valuation. See *id.* at 885.

[19] Rogers, *et al.* v. Western Pacific Railroad Co. and Union Pacific Railroad Co., C.A. No. 7274 (Del. Ch. Ct., Newcastle County); Bruno v. Western Pacific Railroad Co., C.A. No. 7250 (Del. Ch. Ct., Newcastle County).

[20] Under Delaware law, shareholders exercising such appraisal rights are entitled to receive the "fair value" of their equity. Del. Code Ann., tit. 8.

(footnote continues)

Wheeler's petition selectively repeats the points that he advanced below, where he argued that the ICC had unreasonably disregarded Western Pacific's land holdings in evaluating the fairness of Union Pacific's tender offer. Pet. 6-12. But as the Court of Appeals recognized, the "Commission did not simply disregard WP's landholdings. Rather, it stated that such holdings are relatively unimportant in the context of the [capitalized earnings] methodology the Commission used in determining a reasonable range of prices for WP's stock." App. 37a; see App. 302a-303a. And, as the court also acknowledged, the capitalized earnings approach has been used in many prior proceedings to evaluate the reasonableness of proposed transactions.[21] While Wheeler contends that this approach represents a departure from prior Commission practice (Pet. 9-12), his claim is wrong, as demonstrated by the very authorities on which he relies. See, *e.g., Seaboard Air Line Railroad Co. —Merger—Atlantic Coast Line,* 320 I.C.C. 122, 190 (1963) ("the physical values of the railroad properties are not controlling, for under the Schwabacher principle, the predominant factor is the earnings of the properties rather than their values"); see Pet. 9.

The Court of Appeals correctly recognized that

> "although the Commission in fulfilling its statutory responsibilities is to carefully review all of the terms of a merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met."

(footnote continued)

§ 262 (a) (Supp. 1981). Fair value is determined by taking into consideration all the elements of value. Application of Delaware Racing Ass'n, 42 Del. Ch. 175, 206 (Del. 1965). Recently, in Weinberger v. UOP, Inc., 457 A.2d 701 (Del. Supr. 1983), the Delaware Supreme Court endorsed a "liberal approach [to appraisal proceedings which] must include proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court . . . ."

[21] App. 37a, citing Seaboard World Airlines, Inc. v. Tiger International, Inc., 600 F.2d 355, 361-62 (2d Cir. 1979) and Mills v. Electric Auto-Lite Co., 552 F.2d 1239, 1247-49 (7th Cir.), *cert. denied,* 434 U.S. 922 (1977).

App. 37a-38a, quoting *Northern Lines Merger Cases*, 396 U.S. 491, 520 (1970). This is particularly true in circumstances, such as those presented here, where the reviewing court has affirmed the agency's finding that the transaction was the result of "arm's length negotiations" (App. 37a). This Court should reject Wheeler's invitation further to review the Commission's factual determination that $20 per share was a fair price for the Western Pacific stock.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

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APPENDIX

APPENDIX

Set forth below, pursuant to Rule 28.1, is a list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Respondents Union Pacific Corporation, Union Pacific Railroad Company, Missouri Pacific Corporation, Missouri Pacific Railroad Company, and The Western Pacific Railroad Company:

Alameda Belt Line
The Alton & Southern Railway Company
Arkansas & Memphis Railway Bridge and Terminal Company
Bear Creak Uranium Company
The Belt Railway Company of Chicago
Black Butte Coal Company
Brownsville & Matamoros Bridge Company
Camas Prairie Railroad Company
Carbon County Coal Company
Central California Traction Company
Chicago and Western Indiana Railroad Company
Corpus Christi Petrochemical Company
The Denver Union Terminal Railway Company
Esperanza Pipeline Company
Ferguson-Burleson County Gas Gathering System
Frontier Pipeline
Galveston, Houston and Henderson Railroad Company
Great Southwest Railroad, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Longview Switching Company
M-C Carbon Partnership
Medicine Bow Coal Company
Milne Point Pipeline, Inc.
Oakland Terminal Railway
The Ogden Union Railway and Depot Company
Point Arguello Pipeline, Inc.

Portland Traction Company
Portland Terminal Railroad Company
The St. Joseph and Grand Island Railway Company
St. Joseph Terminal Railraod Company
Southern Illinois and Missouri Bridge Company
Stansbury Coal Company
Stauffer Chemical Company of Wyoming
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trailer Train Company
Uinta Development Company
Union Pacific Resources Ltd.

(4) (3) (3)

Nos. 84-621, 84-633, and 84-641

In the Supreme Court of the United States

OCTOBER TERM, 1984

KANSAS CITY SOUTHERN RAILWAY COMPANY, ET AL.,
PETITIONERS
v.
UNITED STATES OF AMERICA, ET AL.

EDWARD K. WHEELER, PETITIONER
v.
INTERSTATE COMMERCE COMMISSION, ET AL.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL.,
PETITIONERS
v.
UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a majority of the Interstate Commerce Commission approved the consolidation of these railroad holding companies.

2. Whether the court of appeals applied the proper standard of review in upholding the Commission's decision.

3. Whether the Commission and the court below properly concluded that the Commission is not required to impose conditions upon the merged railroad designed to increase competition if the conditions are not related to the anticompetitive effects of the merger.

4. Whether the Commission and the court of appeals correctly found that the Commission is required to provide protection only for employees of the railroads that are parties to the transaction.

5. Whether the court of appeals properly affirmed the Commission's finding that the price per share paid to minority shareholders pursuant to the merger was fair and reasonable.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—Continued:

Page

Cases—Continued:

Page

Cases—Continued:

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-621

KANSAS CITY SOUTHERN RAILWAY COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 84-633

EDWARD K. WHEELER, PETITIONER

v.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a[1]) is reported at 736 F.2d 708. The opinion of the Interstate Commerce Commission (Pet. App. 39a-615a) is reported at 366 I.C.C. 459.

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[1] "Pet. App." refers to the appendix filed by petitioners in No. 84-621.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1984. Petitions for rehearing were denied on July 20, 1984 (Pet. App. 621a-629a). The petitions for a writ of certiorari in No. 84-621 and 84-633 were filed on October 17 and 18, 1984, respectively. On August 2, 1984 the Chief Justice extended the time in which to file a petition for a writ of certiorari in No. 84-641 to and including October 19, 1984, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, Union Pacific Corporation (UPC), a railroad holding company, reached an agreement to acquire control of a second railroad holding company, Missouri Pacific Corporation (MP), and to merge with a third railroad holding company, Western Pacific Railroad Company (WP).[2] The parties filed applications with the Interstate Commerce Commission for authority to consummate these transactions pursuant to 49 U.S.C. 11343. Petitioners were among the numerous public and private parties who participated in the ensuing Commission proceeding.[3]

Petitioner Kansas City Southern Railway Company (KCS)[4] urged the Commission to deny the application filed by UPC and MP unless KCS received trackage rights over

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[2]These are the abbreviations that are used by the petitioners in No. 84-621 (Pet. ii n.*).

[3]Numerous railroads, shippers, governmental agencies (including the United States Department of Justice), state and local governments, stockholders, and labor organizations participated in the proceeding before the Commission (see Pet. App. 65a-77a). The proceeding lasted two years, involved ten months of oral hearings before two administrative law judges, and amassed a record consisting of over 18,000 pages of transcript and more than 600 exhibits (see *id.* at 5a-6a).

[4]The second petitioner in No. 84-621, Louisiana & Arkansas Railway Company, is a wholly-owned subsidiary of KCS.

certain MP railroad lines (Pet. App. 70a-71a, 240a). Trackage rights enable one railroad to operate over tracks owned by another railroad for a fee paid to the owner of the tracks. KCS argued that these rights were necessary both to offset what it asserted would be the anticompetitive effects of the consolidation and to enhance its inferior competitive position, which it conceded was unrelated to any anticompetitive effects of the consolidation (Pet. App. 70a-71a, 240a-242a).

Petitioners Brotherhood of Maintenance of Way Employes, et al. (BMWE),[5] argued (Pet. App. 76a) that railway labor interests would be harmed by the proposed consolidation. They advocated the imposition of conditions to protect not only the employees of the merging carriers but also employees of other railroads who might somehow be affected by the consolidation.

Petitioner Wheeler, a stockholder in WP, neither supported nor opposed the merger of UPC and WP. He argued that the price offered by UPC for the WP stock was neither fair nor reasonable (Pet. App. 299a-300a).

The Commission's review of the proposed consolidation was careful and complete (see Pet. App. 39a-615a). Pursuant to the standard contained in 49 U.S.C. 11344(b), the Commission examined the effect of the consolidation on the adequacy of transportation for the public, the effect on the public interest of including other railroads in the area in the proposed transactions, the total fixed charges that would result from the consolidation, and the interests of affected employees (Pet. App. 84a-105a, 276a-282a, 287a). The Commission thoroughly examined the competitive effects of the proposed transactions, and measured the proposals against the national transportation policy set

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[5]All of the petitioners in No. 84-641 are unions that represent railroad workers.

forth in 49 U.S.C. 10101a (Pet. App. 111a-168a, 358a-538a). The Commission also considered whether the transactions would cause any harm to any railroads' essential services (*id.* at 168a-172a). Finally, the Commission considered whether it should require the imposition of any conditions to protect the public or to protect other railroads (*id.* at 193a-250a).[6]

The Commission concluded that, provided certain conditions were imposed, the consolidation was consistent with the public interest (Pet. App. 55a-60a, 84a). It found that the consolidation would result in substantial public benefits without the loss of essential services (*id.* at 84a-104a, 168a-172a, 538a-594a). While some adverse competitive effects could have resulted from the consolidation (*id.* at 149a), the Commission determined that the grant of certain trackage rights to competing railroads would ameliorate the anticompetitive effects of the transactions (*id.* at 57a-58a, 220a, 229a-230a). The Commission did not require the granting of the trackage rights sought by petitioner KCS because it determined that the anticompetitive conditions cited by KCS did not result from the consolidation (*id.* at 240a-245a). The Commission concluded that employees' interests would be safeguarded by the "New York Dock Conditions" traditionally imposed for the protection of the employees of consolidating carriers, and declined to impose conditions to protect the employees of other railroads (*id.* at 276a-281a).[7]

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[6]The Commission addressed a number of other issues that are not relevant to petitioners' arguments in this Court. These issues include the effect of the Pacific Railroad Act, 45 U.S.C. 83, on the UPC/WP consolidation (Pet. App. 172a-193a); removal of certain traffic protective conditions (*id.* at 236a-238a); approval of certain settlements between various parties and the applicant railroads (*id.* at 250a-276a); and environmental considerations (*id.* at 282a-287a).

[7]The "New York Dock Conditions" refer to the labor protective conditions usually imposed by the Commission in rail mergers, which were developed by the Commission in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60, aff'd, 609 F.2d 83 (2d Cir. 1979).

Finally, the Commission concluded that the price to be paid by UPC for the WP stock was fair and reasonable (*id.* at 298a-306a).

2. The Commission and the court of appeals denied several motions for a stay of the Commission's decision approving the consolidation, except for a temporary stay to enable the parties to seek a stay from this Court (Pet. App. 12a n.5). The application for a stay filed by KCS in this Court was denied by the Chief Justice, and the transactions were consummated. The application subsequently was referred to Justice Stevens, who in turn referred it to the entire Court, which also denied the application for a stay.[8]

3. The court of appeals affirmed the Commission's decision in all respects relevant to petitioners' claims before this Court (Pet. App. 1a-38a).[9] The court first addressed the challenges to the Commission's determination that the consolidation was consistent with the public interest (*id.* at 13a-26a).[10] It concluded that the Commission had given

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[8]*Southern Pacific Transp. Co.* v. *ICC*, No. A-544 (Jan. 10, 1984); *Atchison, T. & S.F. Ry.* v. *ICC*, No. A-545 (Jan. 10, 1984); and *Kansas City S. Ry.* v. *ICC*, No. A-546 (Jan. 10, 1984).

[9]The court of appeals remanded the proceeding to the Commission "for further consideration and explanation" of the agency's refusal to grant the request of Denver & Rio Grande Western Railroad Company (DRGW) for independent ratemaking authority over WP's tracks between Utah and Northern California (Pet. App. 32a-33a). This authority would have required the merged railroad to adopt automatically the rate set by DRGW over certain routings. The Commission did not seek review of this decision, and has reopened the proceeding to again consider this issue. *Union Pacific—Control—Missouri Pac.—Western Pac.*, Finance Docket No. 30,000, (severed July 31, 1984) (not printed).

[10]The court of appeals did not address directly the contention of petitioner KCS (see pp. 7-9, *infra*) that the Commission did not approve the consolidation by a majority vote. However, this argument was the basis of KCS's application for a stay and its motion for summary

proper recognition to the role of competition in analyzing the consolidation (*id.* at 14a, 17a-19a). The court observed that "[t]he Commission has always, and should continue, to perform a balancing test which takes a myriad of factors —including competition—into consideration and weighs 'the potential benefits to applicants and the public against the potential harm to the public' " (*id.* at 18a (citation omitted)).

The court rejected contentions by various parties that the Commission's analysis of the public benefits flowing from the proposed consolidation was flawed (Pet. App. 22a-24a). The court accepted the cost figures used in the Commission's analysis (*id.* at 23a), noting that the Commission performed a searching and critical analysis of the methodology and cost data submitted by the parties and made appropriate adjustments which represented an "exercise[] [of] its independent judgment and expertise with respect to the calculation of public benefits" (*id.* at 24a). The court deferred to the Commission in this "fact-bound and technical area" (*ibid.* (footnote omitted)).

The court of appeals also approved the Commission's decision to impose certain conditions on the consolidation to ameliorate any anticompetitive effects (Pet. App. 24a-29a). It upheld the Commission's denial of petitioner KCS's request for trackage rights (*id.* at 27a-29a) that were "concededly unrelated to the consolidation at issue" and therefore "not designed to mitigate any anti-competitive consequences stemming directly from the consolidation" (*id.* at 28a). The court held (*id.* at 29a) that "the Commission is not required to act as a roving ombudsman restructuring railroads on its own in order to satisfy an individual carrier's notion of what effective competition may require."

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reversal, each of which was denied by the court of appeals. The court took note of these prior actions in its opinion on the merits (Pet. App. 12a n.5).

The court of appeals rejected the labor petitioners' challenge to the agency's refusal to extend the "New York Dock Conditions" to the employees of non-applicant carriers (Pet. App. 33a-34a). It based its decision on its prior holding in *Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295, 323-324 (D.C. Cir. 1983), in which the court considered and rejected the same argument.

Finally, the court rejected petitioner Wheeler's challenge to the purchase price offered to WP stockholders. It concluded that the methodology used by the Commission to value the WP stock was reasonable and found that the Commission's conclusion that the offer for the stock was fair was supported by substantial evidence in the record (Pet. App. 35a-38a). In addition, the court concluded that there was substantial evidence to support the Commission's finding that the price resulted from arms' length negotiations between WP and UPC (*id.* at 37a). It held that the Commission took into account all relevant factors, including the enhanced value of the stock in light of the consolidation and WP's land holdings, in arriving at its independent judgment that the offer for the WP stock was fair (*ibid.*).

ARGUMENT

The detailed opinion of the court of appeals, upon which we rely, correctly affirmed the Commission's decision to approve the consolidation of the three railroads without imposing the additional conditions sought by petitioners. The fact-bound determinations challenged by petitioners do not conflict with any decision of this Court or of any other court of appeals. Therefore, further review is not warranted.

1. Petitioner KCS contends (84-621 Pet. 17-19) that a majority of the Commission did not approve the consolidation. The court below properly relegated this matter to the category of "[a]dditional, relatively minor, issues" as to

which the challenges to the Commission's decision were "without merit" (Pet. App. 13a).[11]

Three commissioners joined in the Commission's opinion without expressing any reservations (see Pet. App. 661a-666a). Chairman Taylor filed a concurring opinion that begins, "I endorse completely our decision to approve the primary and related applications with appropriate conditions, thereby allowing this consolidation to go forward" (Pet. App. 315a). Commissioner Simmons began his concurring opinion by stating: "I join in the Commission's decision to approve, with conditions, the consolidation of the Union Pacific, Missouri and Western Pacific rail systems" (Pet. App. 321a). Although both Chairman Taylor and Commissioner Simmons discussed some changes that might have been made in the Commission decision, they plainly endorsed the Commission decision. Thus, five of the six commissioners voted to approve the consolidation.[12]

KCS's argument is based upon the fact that the vote memoranda circulated by Chairman Taylor and Commissioner Simmons stated that they voted to approve the draft decision "subject to" suggested modifications (Pet. App. 656a, 657a). However, these memoranda, which are dated September 22 and 24, 1982, respectively, simply memorialize the results of a closed conference held on September 13, 1984 at which the Commission voted to *approve* the consolidations (see Pet. App. 653a). In light of this fact, and the subsequent issuance of the concurrences (Pet. App. 671a-674a), it is clear that notwithstanding their preference for

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[11]The court of appeals previously had rejected this argument when it denied KCS' request for a stay of the Commission's order. After the denial of the stay, KCS filed a motion for summary reversal based on this issue; that motion also was denied by the court of appeals. Pet. App. 12a n.5.

[12]Commissioner Andre dissented from the decision (see Pet. App. 323a).

additional conditions, Chairman Taylor and Commissioner Simmons each concluded that the consolidation, as conditioned in the Commission's opinion, was consistent with the public interest.[13]

2. KCS asserts (84-621 Pet. 19-24) that the court of appeals adopted an unduly deferential standard of review in upholding the Commission's determination that substantial public benefits would flow from the consolidation. However, at the outset of its analysis (Pet. App. 11a-12a), the court below set forth the standard of review, quoting from *Missouri-Kan.-Tex. R.R.* v. *United States*, 632 F.2d 392, 399-400 (5th Cir. 1980) (citation omitted), cert. denied, 451 U.S. 1017 (1981):

> "[it is not a court's task] to re-weigh the evidence or to draw [its] own inferences from the evidence before the Commission. [It] can ask only whether the Commission has observed the statutory limits that Congress has set for its discretion, whether its action was arbitrary or capricious, or whether its findings are supported by adequate analysis and substantial evidence in the record considered as a whole."

This formulation is in full accord with the standard for review of Commission decisions prescribed by this Court. See *Illinois Central R.R.* v. *Norfolk & W. Ry.*, 385

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[13]KCS is incorrect in its assertion (84-621 Pet. 19) that the concurring opinions should be disregarded because they were not introduced at a formal collective voting conference of the ICC. See, *e.g.*, *T.S.C. Motor Freight Lines, Inc.* v. *United States*, 186 F. Supp. 777, 785-786 (S.D. Tex. 1960), aff'd *sub. nom. Herrin Transp. Co.* v. *United States*, 366 U.S. 419 (1961).

Moreover, KCS's failure to raise this issue before the Commission precludes it from pressing the contention before this Court. See *Vermont Yankee Nuclear Power Co.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553-554 (1978); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952).

U.S. 57, 66, 68-69 (1966); *Chicago, St. P., & O. Ry.* v. *United States*, 322 U.S. 1, 3 (1944); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87-88 (1944).

Petitioner KCS's argument that the court of appeals applied an improper standard of review is nothing more than an effort (84-621 Pet. 19-24) to raise before this Court its factual arguments concerning the calculation of the public benefits of the consolidation, arguments that were rejected by both the Commission (Pet. App. 84a-105a, 561a-562a, 581a-582a) and the court of appeals (*id.* at 22a-24a). Review of this wholly factual issue is not warranted. See *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

The Commission's determination of the benefits of the consolidation was a prediction of uncertain events, and such " 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' " *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978), quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961). The court of appeals properly found (Pet. App. 23a-24a) that there was no merit in the challenges to the assumptions and methodology upon which the Commission's calculation of public benefits was based. It therefore properly upheld the Commission's determination that substantial benefits would result from the consolidation.[14] Further review of these factual issues is not warranted.

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[14]The pitfalls attending the recalculation of benefits urged by KCS are demonstrated by KCS's attempt to discredit the court of appeals' decision by reference to the $13.6 million reduction in car costs that all parties agree was appropriate (84-621 Pet. 23). A careful analysis of the Commission's finding regarding restatement of the applicants' car costs (Pet. App. 559a-560a) and of the Commission's adjustment of costs contained in Attachment C (Pet. App. 575a) shows that the $13.603

3. Petitioner KCS's principal argument (84-621 Pet. 9-16) is that the Commission should have granted KCS's request for trackage rights over a portion of the merged railroad in order to increase competition in certain markets, even though the consolidation did not adversely affect competition in those markets. The court below properly rejected this effort "to use the proposed consolidation as a springboard from which to launch a request for conditions having no connection with that consolidation" (Pet. App. 28a-29a).

KCS does not challenge the Commission's conclusion (Pet. App. 242a-244a; see also *id.* at 28a) that KCS's proposed conditions were not related to the competitive effect of the consolidation. It contends (84-621 Pet. 14-16) that both the Commission and the court of appeals erred by holding that the Commission need not consider conditions unless they are designed to ameliorate the anticompetitive effects of the consolidation under review (see Pet. App. 195a-196a, 28a-29a). The argument is based upon KCS's assertion (84-621 Pet. 12) that the Staggers Rail Act of 1980 (Staggers Act), Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, mandates the imposition of any condition that will increase

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million adjustment was made to reduce the applicants' estimate of a $25.014 million benefit from cars saved through improved utilization of existing cars. This was done by netting the value of equipment saved and the value of the additional equipment required to handle additional traffic, and applying the appropriate rate of return to that net figure. The figure that resulted, $11.411 million, was then deducted from the value of diverted traffic to reduce the value of that private benefit from the $40 million estimated by the Commission to $28.6 million, with a concomitant reduction in the overall benefits (but not the public benefits) of the merger. Compare Pet. App. 569a lines 1 and totals with Pet. App. 575a lines 1, 2(i) and totals. Thus, contrary to the contentions of KCS (84-621 Pet. 23), the Commission not only properly considered the $13.6 million reduction but also appropriately took account of the costs of additional equipment in computing the *private* benefits of the merger relating to diverted traffic.

competition. This contention is supported by neither the Act's language nor its legislative history.

The Interstate Commerce Act provides that "[t]he Commission shall approve [a merger] * * * when it finds the transaction consistent with the public interest" (49 U.S.C. 11344(c)). In making this determination, the Commission must consider the four factors set out in 49 U.S.C. 11344(b)(1) and the policies of the antitrust laws. *United States* v. *ICC*, 396 U.S. 491, 504 (1970).[15] The balancing of these factors is a matter for the Commission. *Penn-Central Merger Cases*, 389 U.S. 486, 498-499 (1968); *Illinois Central R.R.* v. *Norfolk & W. Ry.*, 385 U.S. at 68-69.

Section 11344(b) was amended by the Staggers Act to add a fifth factor to the Commission's consideration of proposed rail mergers — whether the transaction would have an adverse effect on competition among rail carriers in the affected region — which the Commission described simply as a "codification of [its] traditional approach to the evaluation of rail consolidations" (49 U.S.C. 11344(b)(1)(E); Pet. App. 78a). Petitioner KCS's suggestion (84-621 Pet. 12-16) that competition has been raised by the Staggers Act to be "the essential public-interest variable" (84-621 Pet. 12) is incorrect. The court of appeals properly rejected this assertion (Pet. App. 17a-18a), noting that:

> The increased emphasis on competition required by Congress modifies but does not basically alter the ICC's traditional approach, which has always considered the competitive impact of a proposed merger, but not to the exclusion of other factors. * * * * * The

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[15]The factors set out in the statute are: (1) the effect of the transaction on the adequacy of transportation; (2) the effect on the public interest of including other rail carriers in the area in the transaction; (3) the total fixed charges that would result from the transaction; and (4) the interest of employees. 49 U.S.C. 11344(b)(1)(A)-(D).

> Commission has always, and should continue, to perform a balancing test which takes a myriad of factors — including competition — into consideration * * *.

See also *United States* v. *ICC*, 396 U.S. at 513-514; *McLean Trucking Co.* v. *United States*, 321 U.S. at 87-88.[16]

Moreover, the Commission's refusal to consider conditions directed against anticompetitive effects unrelated to the consolidation actually furthers the procompetitive policy of the Staggers Act. The Commission determined that the use of its conditioning power "to make consolidation proceedings vehicles for rail system restructuring" was contrary to Congress' intent that private initiatives govern the structuring of the rail system (Pet. App. 196a-197a). This conclusion was approved by the court of appeals (*id.* at 28a). Since intrusion into the market by federal regulators is precisely what Congress was seeking to limit in enacting the Staggers Act (see 49 U.S.C. 10101a(1) and (2)), the Commission's approach is fully consistent with its statutory mandate.

In addition, expanding the scope of consolidation proceedings as suggested by KCS "would substantially increase their complexity * * * [and] increase the time required to decide these cases" (Pet. App. 197a). Such an increase in delay resulting from the regulatory process, and the possibility that a variety of unwarranted and burdensome conditions could be imposed on a railroad that sought approval of a merger, could discourage mergers that would be procompetitive and beneficial to the public and hinder the private restructuring of the rail industry that Congress sought to promote.

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[16]The court below held (Pet. App. 18a-22a) that the Commission gave full consideration to the competitive factors contained in the National Rail Transportation Policy, 49 U.S.C. 10101a, which was enacted as part of the Staggers Act.

In short, the Commission has exercised its authority to "determin[e] that * * * conditions imposed upon the consolidation had rendered that consolidation consistent with the public interest" (Pet. App. 28a). Since that determination was based upon the proper legal standard and was supported by the evidence, and since the Commission has "extraordinarily broad discretion to impose [such] protective conditions" (*id.* at 25a), further review of this question is not warranted.[17]

4. Petitioners BMWE et al. do not challenge the Commission's decision to impose conditions protecting the employees of the parties to the transaction. They assert (84-641 Pet. 15-20) that the statute directing the Commission to require protective provisions for employees "affected by the transaction" (49 U.S.C. 11347) also mandates the protection of the jobs of employees of railroads that are not parties to the consolidation if those employees' jobs might be affected by the consolidation.[18] The Commission did

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[17]Petitioner KCS's argument (84-621 Pet. 16 n.19) that the Commission's position with regard to this issue is an impermissible "rulemaking by adjudication" is wholly without merit. This Court has consistently held that an agency may formulate and apply policies in adjudications as long as the agency's action comports with fairness. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-204 (1947). Here, the Commission did not apply a new policy to KCS' request for trackage rights. The policy in question was based upon the Commission's prior policy statement, *Railroad Consolidation Procedures*, 366 I.C.C. 75, 92 (1982), and had been applied previously, with the approval of the United States Court of Appeals for the Fifth Circuit, in *Burlington Northern, Inc.—Control & Merger—St. Louis (BN/Frisco)*, 360 I.C.C. 788, 950-952 (1980), aff'd *sub nom. Missouri-Kan.-Tex. R.R.* v. *United States*, 632 F.2d 392 (1980), cert. denied, 451 U.S. 1017 (1981). In that decision the Commission stated that conditions on a consolidation should not be used to ameliorate longstanding problems that are not related to the consolidation under review. See Pet. App. 195a-196a.

[18]These petitioners also argue (84-641 Pet. 11-15) that the Commission's consideration of "the interest of carrier employees affected by the transaction" (49 U.S.C. 11344(b)(1)(D)) must include the effect of

consider additional conditions to protect such employees (Pet. App. 277a-278a), but concluded that they were not required. The decisions of the Commission (*id.* at 278a-281a) and of the court below (*id.* at 34a)[19] that the Commission is not required to impose such conditions are consistent with the decisions of all of the courts of appeals that have considered the question. See *Lamoille Valley R.R.* v. *ICC*, 711 F.2d at 323-34; *Brotherhood of Maintenance of Way Employees* v. *ICC*, 698 F.2d 315, 316-318 (7th Cir. 1983); *Missouri-Kan.-Tex. R.R.* v. *United States*, 632 F.2d at 410-413; see also *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).[20] In addition, the Commission consistently has interpreted 49 U.S.C. 11347 and its predecessor sections as requiring protection only for employees of

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the transaction upon all railroad employees, including employees of railroads that are not parties to the transaction. Since the Commission specifically considered the interests of persons employed by railroads other than the applicants (Pet. App. 60a, 225a, 271a-278a, 281a), this Court need not address this issue.

[19]The court of appeals (Pet. App. 34a) relied upon its prior decision in *Lamoille Valley R.R.* v. *ICC*, 711 F.2d at 323-324, in concluding that the Commission's interpretation of 49 U.S.C. 11347 was correct. The court in *Lamoille Valley R.R.* rested its decision on four points. First, it noted that the agency's reading of the statute was "sensible," because Section 11347 refers only to the rail carrier involved in the merger transaction and "its employees" (711 F.2d at 323). Second, the court noted that the legislative history of the statute supported the Commission's interpretation (*ibid.*). Third, the court found that the Commission's interpretation is "supported by considerations of practicality and administrative economy" (711 F.2d at 323-324), because it would be nearly impossible to rebut allegations that non-applicant carrier employees were adversely affected by a proposed merger. Finally, the court relied upon the agency's consistent interpretation of these sections of the Interstate Commerce Act (711 F.2d at 324).

[20]These decisions are in accord with the weight of district court authority prior to 1975 when Commission decisions were reviewed by three-judge district courts rather than by the courts of appeals. See *Florida East Coast Ry.* v. *United States*, 259 F. Supp. 993, 1019 (M.D.

the merging carriers. This longstanding administrative interpretation is entitled to substantial deference. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Accordingly, absent a conflict among the circuits, there is no warrant for further review by this Court on this point.

5. Petitioner Wheeler asserts that the Commission failed to discharge its obligation to ensure that the merger proposal is fair to minority shareholders (see *Schwabacher* v. *United States*, 334 U.S. 182, 198-201 (1948)). These arguments were properly rejected by the Commission (Pet. App. 298a-306a) and the court below (*id.* at 35a-38a).

Petitioner's principal contention (84-633 Pet. 6-12) is that the Commission failed to consider the value of WP's industrial land holdings, and therefore improperly rejected his challenge to the price offered to WP stockholders. Petitioner bases his argument upon the Commission's observation that land values are of little significance in determining the value of stock in an operating railroad (Pet. App. 302a),

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Fla. 1966), aff'd, 386 U.S. 544 (1967); *Railway Labor Executives' Ass'n* v. *United States*, 226 F. Supp. 521, 525 (E.D. Va.), vacated on other grounds, 379 U.S. 199 (1964).

Petitioners BMWE et al. rely on *Railway Labor Executives' Ass'n* v. *United States*, 216 F. Supp. 101 (E.D. Va. 1963), and the Commission's decision in *Pennsylvania R.R.—Merger*, 347 I.C.C. 536, 546 (1974). However, as two courts of appeals have noted, *Railway Labor Executives' Ass'n* rests on its own peculiar facts. *Lamoille Valley R.R.* v. *ICC*, 711 F.2d at 331; *Missouri-Kan.-Tex. R.R.* v. *United States*, 632 F.2d at 411 n.46. *Pennsylvania R.R.* involved the merger of subsidiaries of the same railroad (see 347 I.C.C. at 546), and therefore is inapposite because only employees of subsidiaries of the merging carriers — who therefore were employees of the applicants — were protected. See *Lamoille Valley R.R.* v. *ICC*, 711 F.2d at 324 n.60. *Soo Line R.R.* v. *United States*, 280 F. Supp. 907 (D. Minn. 1968), also relied on by petitioners (84-641 Pet. 16-18), does reach a contrary interpretation of the Interstate Commerce Act's employee protection section, but that aberrant decision has been rejected by the courts of appeals.

but that statement referred to the Commission's decision that the value of stock in a going concern such as a railroad "is to be measured by earnings power rather than * * * book value which may never be realized" (*id.* at 303a). Thus, the Commission did not find the land holdings irrelevant, it simply decided to account for those holdings indirectly, rather than directly, in the valuation process (see *id.* at 37a).

The Commission's decision to utilize a valuation method based upon the railroad's earning power (its "going concern" value) and not its book value is consistent with its prior decisions concerning this issue. See *Missouri Pac. R.R.—Securities*, 347 I.C.C. 377, 411 (1973); *Seaboard Air Line R.R.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 193 (1963); cf. *Consolidated Rock Co.* v. *Dubois*, 312 U.S. 510, 526 (1941). The record clearly indicates that the value of WP's land was reflected in the methodology used by the Commission to determine the stock's going concern value. As the court of appeals found (Pet. App. 37a), the hypothetical market price for the stock constructed by the Commission included the value of the land. This is because "in a free and actively traded [securities] market, absent compelling reasons to believe otherwise, the market price is held to take account of asset value as well as the other economic, political, and financial factors that determine 'value.' " *Seaboard World Airlines, Inc.* v. *Tiger International, Inc.*, 600 F.2d 355, 361-362 (2d Cir. 1979); see also *Mills* v. *Electric Auto-Lite Co.*, 552 F.2d 1239, 1245-1247 (7th Cir.), cert. denied, 434 U.S. 922 (1977).[21]

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[21]Petitioner Wheeler asserts (84-633 Pet. 8 n.3) that the Commission improperly relied upon stock market prices in ascertaining the railroad's going concern value. His claim that the Commission's prior decisions bar the use of this methodology is incorrect. As petitioner admits (*ibid.*), these decisions indicate that market prices are one appropriate measure of going concern value. See, *e.g.*, *Louisville &*

The value of WP's land holdings also was taken into account in setting the negotiated price of twenty dollars per share. As the Commission indicated (Pet. App. 301a), Salomon Brothers, the investment bankers retained to advise WP's Board of Directors, considered all elements of value in the WP enterprise, including book value and net asset value (*id.* at 298a-299a, 301a), in determining a fair price for the stock.[22] The Commission relied upon this negotiated price in approving the fairness of the transaction (*id.* at 306a). The court of appeals satisfied itself that

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N.R. Co.—Merger, 295 I.C.C. 457, 498 (1957). Moreover, even if the Commission did apply a slightly different test in this case, petitioner Wheeler has cited no authority to support his apparent view that the Commission cannot change the methodology used to ascertain going concern value. Cf. *American Trucking Ass'n* v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967) (the Commission is "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday"). The state law cited by Wheeler (84-633 Pet. 10-12) obviously does not bind the Commission (*Schwabacher* v. *United States*, 334 U.S. 182, 198 (1948)).

Wheeler's attempt (84-633 Pet. 8 n.3) to show that the stock's market price was an unreliable indicator of WP's earning power also is unavailing. His unsupported, improbable assertions that neither the financial community nor the WP Board of Directors (advised by an independent investment banking firm, Salomon Brothers) was aware of the value of the land holdings and that these holdings were not taken into consideration by UP in establishing its offer provide no basis for rejecting the market price approach. His conclusory statement (*ibid.*) that the market price was "depressed" also is insufficient to undercut the Commission's analysis.

[22]Petitioner Wheeler contradicts the record when he asserts (84-633 Pet. 3) that the negotiated twenty dollars per share figure was based solely on WP's "stand alone" value and did not reflect the current value of WP's real estate or the stock's increased value as a result of the merger (see Pet. App. 298a-301a). He contradicts himself when he telescopes the several months of negotiations (84-633 Pet. 3 ("fall of 1979 * * * January 18, 1980")) to "but one afternoon" (*id.* at 10 n.5).

there was substantial record evidence to support the Commission's conclusion that this price was arrived at as a result of arm's length negotiations between WP and UPC (*id.* at 37a). As the court of appeals noted (*id.* at 38a, quoting *United States* v. *ICC*, 396 U.S. at 520):

> "although the Commission in fulfilling its statutory responsibilities is to carefully review all of the terms of the merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met."

Under this standard, there is no warrant for further review of this issue.[23]

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[23]Petitioner Wheeler's challenge (84-633 Pet. 13) to the Commission's "merger premium analysis" also is meritless. As the court of appeals found (Pet. App. 36a), the Commission properly considered the enhanced value of WP stock as a result of the merger. Petitioner Wheeler's claim is fatally flawed by his misunderstanding of the Commission's construction of the "premium." The Commission found that the present value of the stock's market value, including the "premium," was $38. However, this determination did not reflect the allocation of the benefits of the merger between the two parties to the merger (see Pet. App. 304a-305a). Allocation of these benefits reduced the stock's constructed value to a range of $16.25 to $26.25 (*id.* at 305a-306a). The $20 per share price offered to stockholders falls within this range, and therefore qualifies as fair and reasonable.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1985

DOJ-1985-01

No. 84-641

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,
BROTHERHOOD OF RAILROAD SIGNALMEN,
BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
and the UNITED TRANSPORTATION UNION,
Petitioners,

v.

UNITED STATES OF AMERICA, and the
INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*

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Date: February 7, 1985

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

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In January 1985, respondents Union Pacific Corporation and Missouri Pacific Corporation, along with their three operating railroads [hereinafter, "Applicant respondents"], and the United States, along with the Interstate Commerce Commission [hereinafter, "Federal respondents"], filed separate briefs in opposition to the three petitions which had been filed with this Court for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the

decision of that court in *Southern Pacific Transportation Co.* v. *ICC,* 736 F.2d 708 (D.C.Cir. 1984). Both the Federal and the Applicant respondents made several factual statements and legal arguments in their briefs to which petitioners in No. 84-641 believe a response should be made. Therefore, petitioners Brotherhood of Maintenance of Way Employes, *et al.* [hereinafter, "Rail Labor petitioners"], respectfully submit this Reply Brief pursuant to Rule 22.5 of the Rules of this Court.

I. Rail Labor's Challenge To The Commission's Failure To Consider The Interests of *All* Railroad Employees Does Not Present A Fact-Bound Issue, But, Rather, Presents A Conflict In Statutory Interpretation, The Resolution Of Which Is Crucial To The Orderly Administration of the Interstate Commerce Act

When this case was before the court of appeals, Rail Labor asked that court to set aside the Interstate Commerce Commission's [hereinafter, "ICC" or "Commission"] approval of the Union Pacific's control of the Missouri Pacific and Western Pacific, in part, because that agency had not complied fully with Congress' directive in 49 U.S.C. § 11344(b)(1)(D). That section, Rail Labor asserted, provides that in determining whether such a control transaction is consistent with the public interest, the Commission must consider the interests of all railroad employees who might be affected by the proposed transaction, including non-applicant carrier employees. In rejecting Rail Labor's argument as to the scope of that section, the court of appeals did not conduct a factual examination of the ICC's decision to ascertain whether that agency had in fact examined the interests of *all* railroad employees. Rather, Rail Labor's argument was rejected because the court, by referring to its earlier decision in *Lamoille Valley R.R.* v. *ICC,* 711 F.2d 295 (D.C.Cir. 1983), concluded that the Commission need not consider the interests of non-applicant railroad employees in determining whether the transaction was in fact consistent with the public interest.

Even though the court of appeals rejected Rail Labor's argument for a purely legal reason, the federal respondents nevertheless argue to this Court that Rail Labor's challenge on this issue presents a "fact-bound" question, and, thus, should not be entertained by this Court. Fed. Resp. Br. at 7. Moreover, the Government asserts further that this Court need not consider whether 49 U.S.C. § 11344(b)(1)(D) includes within its scope non-applicant railroad employees, because the Commission "specifically considered the interests of persons employed by railroads other than the applicants" in approving the control application. *Id.* at 15 n.18. Besides being factually erroneous,[1] the Government's arguments on this point serve only to highlight why this Court should grant Rail Labor's request for a writ of certiorari.

Section 11344(b) of the Interstate Commerce Act, 49, U.S.C. § 11344(b), sets forth some of the factors which Congress has commanded the ICC to consider in determining whether a control transaction is in fact consistent with the public interest. As the courts of appeals have recognized, the "[f]ailure to consider all congressionally mandated factors is clearly grounds for setting aside agency action." *Detroit, Toledo & Ironton R.R.* v. *United States,* 725 F.2d 47, 51 (6th Cir. 1984). Consequently, it is clear that the correct scope and

[1] Respondents' assertions that the ICC did in fact examine the impact of the control transaction on non-applicant employees, are simply not supported by the ICC's decision. A review of that agency's lengthy decision shows that the ICC acknowledged that it had to consider the interests of all railroad employees affected by the transaction (*e.g.*, App. B at 60a), but then considered the impact of the transaction on Applicants' employees only. *Id.* at 276a-80a. Surely, such consideration does not comply with the law. *See Central Transport, Inc.* v. *United States,* 694 F.2d 968, 972 (4th Cir. 1982). The Federal respondents attempt to support their view of the record by referring to that portion of the ICC's decision where the agency refused to increase the levels of protection for affected employees. *Id.* at 278a-80a. Respondents' reference to that portion of the ICC's decision does not support their contention that the agency considered the interests of non-applicant employees, because the referred-to-portion of the ICC's decision is taken out of context. In that portion of the decision, the ICC was considering the levels of protection required by Section 11347—*e.g.*, whether affected employees would be required to move—and not the question of whether those protections should protect non-applicant employees.

interpretation of 49 U.S.C. § 11344(b)(1)(D) is crucial both to an orderly administration of the Interstate Commerce Act and to the proper implementation of Congress' directives concerning rail consolidations.

In this case, the Commission recognized in its decision (*e.g.*, App. B. at 60a, 84a) and in its brief to the court of appeals (ICC Br. at 19, 76) that Section 11344(b)(1)(D) refers to all railroad employees who might be affected by a control transaction, and not just to employees of the applicants. Moreover, the federal respondents have implicitly conceded in their brief to this Court that Rail Labor's interpretation of the scope of Section 11344(b)(1)(D) is correct. Fed. Resp. Br. at 14-15 n.18. But nevertheless, according to the court of appeals in this case, the ICC's view of the broad scope of Section 11344(b)(1)(D) is no longer the law, at least in the District of Columbia Circuit.

As Rail Labor noted in its petition to this Court (Pet. at 13-14), all but one reviewing court [2] which had addressed this issue either directly or indirectly prior to the *Lamoille Valley* case, had either assumed or concluded that the ICC's broad interpretation of the scope of Section 11344(b)(1)(D) and its predecessor [3] was the proper construction of that statute. *E.g.*, *Soo Line R.R.* v. *United States,* 280 F.Supp. 907, 923 (D.Minn. 1968) (3 Judge Court); *Railway Labor Executives' Assoc.* v. *United States,* 216 F.Supp. 101, 102-03 (E.D.Va. 1963) (3 Judge Court); *accord, Missouri-Kansas-Texas R.R.* v. *United States,* 632 F.2d 392, 412-13 (5th Cir. 1980), *cert. denied,* 451 U.S. 1017 (1981). Consequently, the D.C. Circuit's narrow interpretation of Section 11344(b)(1)(D) is in conflict both

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[2] *Florida E.C. Ry.* v. *United States,* 259 F.Supp. 993 (M.D.Fla. 1966) (3 Judge Court), *appeal on relevant part dismissed as moot sub nom. Railway Labor Executives' Assoc.* v. *United States,* 386 U.S. 544 (1967). In their Brief, the federal respondents incorrectly imply that the labor issue of the *Florida East Coast* case was affirmed by this Court. Fed. Resp. Br. at 15-16 n.20.

[3] 49 U.S.C. § 5(2)(c) was recodified by Pub. L. No. 95-473, 92 Stat. 1337 (1978), as 49 U.S.C. § 11344(b); *see,* Rail Labor's Petition at 8 n.5.

with decisions by other reviewing courts and with the ICC's longstanding view of that statutory provision.

That conflict, contrary to respondents' assertions, does not present a question of fact, but, rather, clearly presents an issue of law—*i.e.*, the proper interpretation of Section 11344(b)(1)(D) of the Interstate Commerce Act—which merits this Court's review. The factual issue—*i.e.*, whether the ICC considered the interests of *all* railroad employees as it asserts it did—will not be justiciable until this Court concludes that Rail Labor's construction of Section 11344(b)(1)(D), as the ICC acknowledges, is correct.

II. Contrary To Respondents' Assertions, The Issue Of Whether 49 U.S.C. § 11347 Requires The Commission To Impose An Arrangement Which Protects The Interests Of All Railroad Employees Affected By A Control Transaction, Presents An Issue Which Merits Review By This Court

Both the Federal and the Applicant respondents assert that the court of appeals' conclusion, that 49 U.S.C. § 11347 does not require the Commission to protect the interests of affected non-applicant railroad employees, is "consistent with the decisions of all of the court of appeals that have considered the question." *E.g.*, Fed. Resp. Br. at 15. Respondents then seek to enhance the import of that assertion by referring this Court to decisions by the Second, Fifth, Seventh, and D.C. Circuits. *E.g.*, Applicant Resp. Br. 11. Respondents reliance upon decisions by the Second and Seventh Circuit courts of appeals, however, is misplaced, for those courts neither addressed nor faced the non-applicant carrier issue in the decisions cited by respondents. *See, Brotherhood of Maintenance of Way Employes* v. *ICC*, 698 F.2d 315 (7th Cir. 1983); *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). Those cases involved challenges either by rail labor (*Maintenance of Way* case) or by the carriers (*New York Dock* case) to the levels of

protection provided by the ICC's standard employee protective conditions,[4] and did not raise the issue of whether those levels of protection extended to, or did not extend to, non-applicant railroad employees. Consequently, it is misleading and inaccurate to assert, as respondents do, that the court of appeals' decision in this case is consistent with decisions by the Second and Seventh Circuits.

When the relevant court of appeals' case authority is examined in this case, it becomes apparent that the D.C. Circuit's approach to the scope of 49 U.S.C. § 11347's protective obligations is consistent with only the decision by the Fifth Circuit in *Missouri-Kansas-Texas R.R.* v. *United States, supra.* However, as indicated earlier (p. 4, *supra),* the Fifth and D.C. Circuits do not fully agree on this issue because there is a conflict between those Circuits over the proper relationship between Section 11344(b)(1)(D) and Section 11347. Moreover, as Rail Labor showed in its petition (Pet. at 16-20), both the *Missouri-Kansas-Texas'* and D.C. Circuit's decisions rest upon foundations which are so replete with legal and factual errors as to require this Court, in the exercise of its supervisory power if for no other reason, to review the decision by the court of appeals in the case *sub judice.*

An example of the shifting-sand upon which the decision below rests may be seen from a cursory examination of the Federal respondents' efforts to defend the D.C. Circuit's *Lamoille Valley* case, 711 F.2d 295 (D.C. Cir. 1983). According to the Federal respondents (Fed. Resp. Br. at 15 n.19), the *Lamoille Valley* decision rests upon four points. "First, [the Court of appeals] . . . noted that the agency's reading of the statute was 'sensible,' because Section 11347 refers only to the

[4] In the *New York Dock* case, the carriers asserted that the amount of benefits afforded by the Commission's protections were too generous and too costly; those arguments were rejected by the Second Circuit. 609 F.2d at 94-95. In the *Maintenance of Way* case, rail labor argued that the Commission's standard protections did not give affected employees all of the benefits to which they were entitled (*e.g.,* more beneficial relocation protections); those arguments were rejected by the Seventh Circuit. 698 F.2d at 318.

rail carrier involved in the merger transaction and 'its employees' (711 F.2d at 323)." Fed. Resp. Br. at 15 n.19. Respondents' argument on this point fails to recognize that the language in Section 11347 to which the D.C. Circuit referred was added by the 1978 recodification. That recodification, however, was merely a restatement "without substantive change" of the prior statute and was not to be "construed as making a substantive change in the laws replaced." Section 3(a), Pub. L. No. 95-473, *supra,* 92 Stat. at 1466. Prior to its recodification, Section 11347's predecessor clearly and unambiguously provided that the protections were to be extended to "employees of the carrier or carriers by railroad affected by [the ICC's] . . . order . . . ." 49 U.S.C. § 5(2)(f) (repealed by Pub. L. No. 95-473, *supra*) (reproduced in Rail Labor's Petition at 7b). Consequently, it is improper to rest a narrow construction of Section 11347 upon the 1978 recodification.[5]

The second basis upon which the *Lamoille Valley* decision rests, according to respondents, is "that the legislative history of the statute supported the Commission's interpretation . . . ." Fed. Resp. Br. at 15 n.19. That view of the legislative history is refuted by the plain language which Congress used in 1940 when the predecessor of Section 11347 was first enacted. 49

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[5] The Federal respondents' reliance upon the terms of the 1978 recodification to support their interpretation of Section 11347 is disingenuous, for the ICC has recently refused to apply *Cosby* v. *ICC,* 741 F.2d 1077 (8th Cir. 1984), to other rail-motor carrier cases because, in its opinion, the *Cosby* court improperly relied upon the 1978 recodification to conclude that Congress had made a substantive change in Section 11347. As the ICC stated:

> In *Cosby,* the court stressed that, in recodifying section 5(2)(b), Congress changed "rail carrier employees" to "carrier employees" . . ., and, therefore, found that protection of all employees [including Motor Carrier employees] was required. This reading of the recodification totally and inaccurately ignores section 3 of the recodification, which states that "Sections 1 and 2 of this Act restate, without *substantive change,* laws enacted before May 16, 1978 . . . ." (emphasis added) . . . . Hence, no substantive change in the statute was made that requires us to protect motor employees . . . .

ICC Finance Docket No. 28640 (Sub-No. 9), *Chicago, M., St. P. & Pac. R.R.—Reorganization,* served January 11, 1985, slip op. at 16.

U.S.C. § 5(2)(f) (repealed). As this Court has noted before, the plain language is all that should be examined when the terms of a statute are clear and unambiguous. *E.g., Rubin* v. *United States,* 449 U.S. 424, 430 (1981). Moreover, other courts, looking at the relevant statutory language, have reached a result contrary to the D.C. Circuit's. *E.g., Soo Line R.R.* v. *United States, supra,* 280 F. Supp. at 922-24.

The third reason for the *Lamoille Valley's* decision upholding the ICC's narrow construction of its protection obligations under 49 U.S.C. § 11347, was that the ICC's interpretation was " 'supported by considerations of practicality and administrative economy' (711 F.2d at 323-24) . . . ." Fed. Resp. Br. at 15. n.19. That reasoning, however, does not justify a result contrary to the plain language of the statute, for the decision as to what is practical and administratively feasible is for Congress to make. Federal courts, petitioner respectfully submit, do not have the right to legislate under the guise of statutory interpretation. *United States Railroad Retirement Board* v. *Fritz,* 449 U.S. 166, 179 (1980).

The fourth and most fallacious reason advanced by the court of appeals below, and by respondents in support of that result, is that the ICC, the court stated, has consistently given Section 11347 a narrow interpretation. That factual assertion is plainly incorrect. As Rail Labor has explained in its petition (Pet. at 16-17), the issue as to the proper scope of Section 11347's predecessor was squarely raised in the 1960's and was presented to at least four reviewing courts under former 28 U.S.C. § 2321, *et seq.* (3 Judge Court deleted by Pub. L. No. 93-584, 88 Stat. 1917 (1975)), and all but one of those courts ruled that the scope of Section 11347 was limited solely by the question of whether the railroad employee was *affected* by the transaction, and not by the question of whether the employee's employer was an applicant. *Soo Line R.R.* v. *United States, supra,* 280 F.Supp. at 922-23; *Railway Labor Executives' Assoc.* v. *United States,* 226 F.Supp. 521, 525 (E.D.Va.) (3 Judge Court), *vacated on other grounds,* 379 U.S. 199 (1964); *Railway Labor Executives' Assoc.* v. *United States, supra,* 216 F.Supp. at 102; *but see, Florida East Coast Ry.* v. *United States, supra.*

While the ICC at first objected to the reviewing courts' view of the statute, that agency did not seek review of those decisions in this Court, and by 1974 it had clearly accepted the rationale of those decisions. In its *Pennsylvania R.R.—Merger* decision, 347 I.C.C. 536, 546 (1974), the ICC stated as follows:

> [S]ection 5(2)(f) of the act mandates that, as a condition to its approval, the Commission require a fair and equitable arrangement to protect the interests of the railroad employees affected. Such employees, to be protected, need fulfill only two requirements, they must be railroad employees and they must be affected by the merger. *Soo Line Railroad Company* v. *United States,* 280 F.Supp. 907 (1968). The protection required under the act is not limited to employees of carriers directly involved in the transaction. All railroad employees affected are under the aegis of the act. The only question is whether such employees are affected, i.e., touched sufficiently by the transaction. *Railway Labor Executives' Association* v. *United States,* 216 F.Supp. 101 (1963).[6]

Consequently, when the support for the decision below is viewed objectively, and when that decision is compared with the consistent decisions by the Three-Judge courts on this issue, it is apparent that respondents are incorrect in asserting that this case does not merit review by the Court.

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[6] The Federal respondents seek to distinguish the *Penn Central* decision by stating that it involved subsidiaries of the applicants and is therefore inapposite. Fed. Resp. Br. at 16 n.20. That assertion is specious. First, the decision itself did not state or even intimate that its reliance upon the *Soo* and *Railway Labor* cases was premised on that factual predicate. And second, the fact that the railroad employees involved were employees of Penn Central subsidiaries was relevant to only the second prong of the *Railway Labor* and *Soo* test—*i.e.*, were those employees sufficiently touched by the transaction to be deemed "affected."

CONCLUSION

For the reasons set forth herein and in the petition, the Rail Labor petitioners respectfully request that their petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

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